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OUR CONSTITUTIONAL MOMENT
ADAM J. WHITE

The Great Surveillance Controversy

FISA and its origins

BY APRIL DOSS

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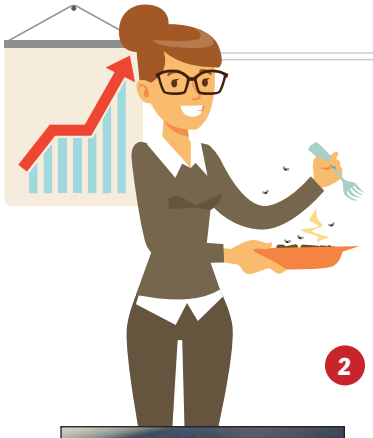

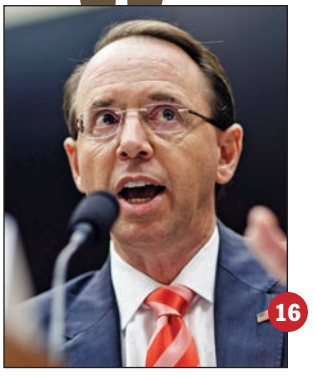

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Comedian-Americans

Daily Show host Trevor Noah has expressed the novel view that France's recent victory in the World Cup is an "African victory," since most of the players on the team are of African descent. This didn't go over well with the French ambassador to the United States, Gérard Araud, who wrote a terse letter to Noah. "As many players have already stated themselves," Araud wrote, "their parents may have come from another country but a great majority of them (all but two of 23) were born in France; they were educated in France; they learned to play soccer in France; they are French citizens."

French—no, really—players celebrate, July 15.

That's well stated. Then the ambassador takes a shot at his host country: "Unlike in the United States of America, France does not refer to citizens based on their race, religion or origin. To us there is no hyphenated identity, roots are an individual reality."

We have no interest in defending Trevor Noah, whom we regard as an unfunny philistine, and it's true that the ambassador rather unfairly overstates the degree to which French society is governed by *fraternité*. But Araud has a point. A man born and raised in France is French, full stop.

One other note. Of the current crop of left-wing, explicitly political comedians with late-night talk show gigs, Noah is South African, HBO's John Oliver is British, and TBS's Samantha Bee is Canadian. Not one of these people who make a living mocking American politics was raised in the United States. We wonder how many foreign-born comedians make a living in France by mocking French politics. ♦

The Mindless Menace of Entry-Level Pay

The left-wing organization MoveOn subjected itself to ridicule this week by posting a message to its social media accounts: "Low wages are violence. Knowingly letting people suffer is violence. It must end." The attached graphic had to do with the minimum wage, which the staff at MoveOn in their infinite wisdom believe should be $15. A young man holds a placard bearing the words "I'm doing the job of 3 people: cashier, baker, and running the store. Thats lot [*sic*] of work just minimum wage. I deserve $15 and union rights."

Nah.

We'll leave it to readers to decide what kind of store-owner lets his or her minimum-wage employee "run" the place. We'll also leave aside that word "deserve" and suggest to the suffering employee that, with the unemployment rate just over 4 percent, it's a job-seeker's market out there and he may wish to look around.

It was the statement that "low wages are violence" that had people spewing coffee onto their laptops. If low wages are violence, then there is no such thing as violence, and words have no meaning.

In MoveOn's defense, though, it has to be said that this use of the word *violence* didn't come from nowhere. James Bowman, in his fine book *Honor: A History*, attributes the generic use of the word to the decline of what he calls cultural (as distinct from reflexive) honor. "Originally it referred only to criminal violence, as its relation to 'violate' reminds us. But its modern sense makes it difficult if not impossible for us any longer to express the distinction, so central to cultural honor, between good and bad, right and wrong, just and unjust fighting."

We recall, for instance, Robert Kennedy's 1968 speech on the "mindless menace of violence." The nation was wracked by street violence, Kennedy said, but there was

> another kind of violence, slower but just as deadly, destructive as the shot or the bomb in the night. This is the violence of institutions; indifference and inaction and slow decay. This is the violence that afflicts the poor, that poisons relations between men because their skin has different colors. This is a slow destruction of a child by hunger, and schools without books and homes without heat in the winter.

RFK spoke these words just as news spread of Martin Luther King's assassination, and the speech is moving in its way. But it played a role in making the word *violence* synonymous with any lamentable social ill. If schools without books are a form of violence, so are low wages. But if that's true, how do we describe actual violence—muggings, murder, rape? These, we assume, are now called *statistics*. ♦

A Little Something to Take the Edge Off

One of the annoyances of modern life is the way in which highly technical studies in medical journals

TOP: FEI MAOHUA / XINHUA / GETTY; BOTTOM: SEAN RAYFORD / GETTY

are reported in the media as though their practical relevance were immediate. Journalists who don't grasp the nuances of the study's conclusions and qualifications report that white wine may cause bladder cancer or too much oregano contributes to Alzheimer's or newborns should always sleep facing down (or is it facing up?).

We can't pin all the blame on journalists, either. As Richard Harris recently showed in his terrific book *Rigor Mortis: How Sloppy Science Creates Worthless Cures, Crushes Hope, and Wastes Billions*, scientists themselves often use faulty reasoning and sloppy experimentation to come up with what sound like headline-making discoveries that, on further examination, don't mean a thing.

With all that in view, we pass along this item from *NBC News*:

> A mind-controlling parasite found in cat feces may give people the courage they need to become entrepreneurs, researchers reported Tuesday. They found that people who have been infected with the *Toxoplasma gondii* parasite are more likely to major in business and to have started their own businesses than non-infected people. The parasite, which makes rodents unafraid of cats, may be reducing the fear of failure in people, Stefanie Johnson of the University of Colorado and colleagues said.

Maybe there's something to it. But if you're nervous about that upcoming interview or boardroom presentation, we'd caution not to prep by ingesting cat poop. Or if it's anxiety that's keeping you from performing well or taking healthy risks, try a glass of wine. Not white wine, though. We hear that causes cancer. ♦

A Talent for Exhibition, Anyway

Rob Rogers, cartoonist at the *Pittsburgh Post-Gazette* for 25 years, was recently fired. Rogers was known for drawing acerbically satirical cartoons about Donald Trump. It follows, at least in the minds of the #resistance, that he was fired because he was anti-Trump. The Scrapbook knows about this ruckus only because the Corcoran School of the Arts in Washington has showcased a new exhibition of 18 Rogers drawings, "Spiked: The Unpublished Political Cartoons of Rob Rogers."

"This exhibition should have never happened," the Corcoran's Sanjit Sethi told the *Washington Post*, meaning that the cartoons should have run in the newspaper instead. "The Corcoran is stepping in to provide an opportunity for this work. . . . It's dangerous, [as] cultural institutions see, that work like this is being categorically censored."

Censored? Evidently the *Post-Gazette* doesn't have the right to can an artist whose work no longer pleases the paper's readers or management. Of course, newspapers all over the country have fired so many people in recent years we wonder how some of them still manage to bring out a paper every day, but perhaps, we reflected, Rogers's cartoons were so profoundly affecting

A sample Rogers cartoon

LEFT: (ORIGINAL FIGURE) BIGSTOCK; RIGHT, ROB ROGERS, REPRINTED WITH PERMISSION

or incisively witty that the *Post-Gazette* really had no reason to get rid of him other than that he didn't like Trump.

So we took in the show at the Corcoran. We're no great fans of the 45th president ourselves, but we weren't impressed. Rogers's work strikes us as preachy, too dependent on text, and stylistically off-putting. We tend to agree with Sanjit Sethi: This exhibition should have never happened. ♦

The Naked Public Square

What do most people do when they see a naked or nearly naked person in public? Most probably experience a moment of shock, point and laugh, call the police, or all of the above. Ask Eric Stagno. After seeing him parade around naked in a Planet Fitness gym doing "yoga-like" exercises, alarmed gym members called the police, who carted him away in handcuffs despite his claims that he thought Planet Fitness was a "judgment-free zone." The phrase "judgment-free zone" shouldn't be taken too literally.

This bit of common sense comes as a surprise to Anna O'Brien. She's the woman who recently stepped onto a platform in the middle of Times Square in New York City, shouted "Let's do this!"—and stripped down to a pink bikini for a photo shoot.

Not surprisingly, she was subjected to an impromptu public comment period, with remarks ranging from the bemused to the supportive to the downright creepy. O'Brien does not look like the Forever 21 models plastered on billboards in Times Square. The founder of a "curvy fashion blog," she is, well, obese.

Anna O'Brien in Times Square

ANNA O'BRIEN, VIA INSTAGRAM

But her zaftig measurements aren't the problem; her enormous lack of self-awareness is. Writing about her experience in *Cosmopolitan*, O'Brien admits she was the one who suggested the Times Square location for her photo session, even as she complains about the uncharitable attention she attracted—several men expressed their appreciation in less than gentlemanly terms. O'Brien notes, peevishly, that the infamously half-naked, painted *desnudas* prowling around nearby weren't being targeted with inappropriate remarks. Then again, they make a meager living taking smiling pictures with lecherous tourists, not whining about their lives on a curvy fashion blog. Spying someone filming her while she posed, she says, "I was just a body he wanted to exploit and use. My feelings didn't matter." The agony continues: "Tears began to well up. I was prepared to be pointed at, shamed, and called fat. I didn't expect to be fetishized."

What did she expect? To be offered a MacArthur genius grant? "I wanted to make a statement and I wanted to be seen," O'Brien admits. To be sure, dropping trou in Times Square is indeed likely to get you "seen." Which is why her complaint—"I'm more than my body and I deserve respect and human decency"—rings a bit hollow. What of the respect and decency O'Brien owed to the public? And imagine if no one had reacted at all. Would O'Brien then have complained that she was being marginalized and ignored—not fat-shamed, nor fat-fetishized, but fat-silenced?

O'Brien only recovers her poise when a little girl tells her she looks pretty, unwittingly endorsing the hegemonic appearance-based standards she thought she was rebelling against. "I realized in that moment, it had all been worth it. I had been seen."

Note to other would-be Times Square exhibitionists: If you strip down in public, you will be "seen." But you don't get to decide what the people who are "seeing" you think about it. ♦

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Your Thoughts and Prayers

Difficult to determine the exact point when a word or phrase departs reality and becomes weightless, perfunctory, without the least credibility. When, for example, was the last time you took seriously anyone's—a friend's, a sales clerk's, a begging homeless person's—exhortation to "Have a nice day"? Some pump it up to "a nice weekend," "holiday," "summer," "fiscal quarter," but all to little avail. Such pure verbal rubbish has the phrase become that "Have a nice day" is now included as one of the country's three most common lies: The other two are "The check is in the mail" and "Don't worry, sweetie, I've had a vasectomy."

BIGSTOCK

Another phrase about to enter the status of verbal inanity is the response, when a death is reported, that runs, "Our thoughts and prayers go out to the family." The phrase is usually uttered—often "muttered" is closer to it—by public officials. President Obama used it quite often, never very convincingly. When President Trump uses it, it is, somehow, even less convincing. I have heard sports broadcasters spray it around when a famous athlete pegs out. I should imagine it is big in show business, possibly, among actors, with a tear added at no extra charge.

The only thing more difficult than paying condolences, in my experience, is receiving them. Easily the most awkward moment at any funeral service is when one has to pass before and greet the family of the deceased. A few words of comfort, some expression of sympathy, is expected, indeed required. To say one is sorry won't do, and besides it is inaccurate, unless your failure to supply blood or donate an organ directly caused the person's death. To mention that you will miss him seems trivial next to the effect of his loss on his family. To claim one loved him and will miss him sorely is likely to call for the suspension of disbelief on the part of the bereaved.

Candor, on the other hand, though tempting, is never an alternative. "He never really got it, did he?" is not likely to go down well with a man's grieving wife. "He really could be a bit of a bore, especially toward the end" doesn't sound quite the right note, either. Nor "I never understood what you saw in him." Nor, again, "I was always impressed by the extent to which he overestimated his charm." Best, too, to hold back on "He died owing me $500, but no hurry in repaying it." Perhaps the rule for paying condolence is that which W. H. Auden lay down for Catholic confession: "Be brief, be blunt, be gone," but without the blunt part.

Most of the condolence paid me at the death of family has been less than memorable. I had remarkable parents, but I cannot recall, at either of their funerals, anyone comforting me by saying anything remarkable about either of them. The one piece of memorable condolence I have ever received came from my friend Norman Podhoretz. When someone very dear to me died, he sent me a note saying that the only recompense I could take from this death was that nothing as sad was likely to happen to me for the remainder of my life. Turns out he was right.

The Irish have their wakes, the Jews their *shivas*, but even with the lubricants of whiskey or the comforts of religious ritual, condolence remains awkward for nearly everyone. It should be more awkward for those public figures who have fastened on to that useless gurgle—"thoughts and prayers," sometimes "prayers and thoughts"—a formulation unconvincing at best, never less than glib. How much time did an Obama or does a Trump take to devote thought (forget about prayer) to the death of a Navy SEAL in Afghanistan or a Marine in Iraq? Less, no doubt, than a nanosecond, which, at last calculation, is a billionth of a second. Out of the mouth of a politician, that "thoughts and prayers" shibboleth has all the resonant sincerity of the sound made by compressing a whoopee cushion.

The larger problem, of course, is big D, not Dallas but Death itself. Everyone may know that he or she is going to die, yet, as Turgenev somewhere says, death, that most democratic of events, is itself an old joke that strikes each of us afresh. All but the most carefully chosen, the most heartfelt, words in its presence are rendered otiose. Unspeakable in its profundity, it is scarcely a surprise that death renders us speechless.

May anyone who is reading this not be in need of condolence for years to come. But should the need arise, if anyone tells you that you are in his thoughts and prayers, my advice is to look that person straight in the eye and tell him to have a nice day.

Joseph Epstein

the weekly Standard

Farm Aid

One of the ironies of welfare-state policymaking is that governments often feel obliged to create programs to offset the ill effects of other programs. Lotteries, for instance, lead to public-service campaigns warning people about the addiction to gambling fostered by lotteries. The U.S. government spends money on public television children's programs that air alongside public-service messages that discourage kids from spending too much time in front of the television. If government programs encourage unhealthy behavior, wouldn't it be wiser and easier just to get rid of the programs?

But government expenditures often exist outside the world of ordinary logic, and in any case the dollar amounts are usually too small for most people to get exercised about. On July 24, however, the Trump administration announced a breathtakingly expensive version of this perverse offset dynamic: a $12 billion aid package for farmers harmed by retaliatory tariffs imposed by foreign governments in response to Trump's trade barriers. Got that? A problem caused by bigger government (tariffs) will be solved by expanding government further (bailouts for farmers).

If China won't buy it, Uncle Sam will.

ROBERT NICKELSBERG / GETTY

Retaliation for the various tariffs Trump has imposed and his administration implemented since January was entirely predictable. Mexico, feeling the pain of U.S. levies on steel and aluminum, hit American pork. The E.U. put tariffs on a host of American products, including rice, cranberry juice, and corn. China announced retaliatory tariffs on more than 500 American products. Already, the Chinese have begun to curtail importation of American soybeans—a trade valued at around $14 billion a year.

All of this apparently came as a surprise to Trump's top trade adviser, Peter Navarro. "I don't believe any country is going to retaliate for the simple reason that we are the most lucrative and biggest market in the world," Navarro said in a Fox Business interview in March. It's hard to understand why he'd make an argument that could so easily be falsified by events—and make it so confidently—so we're inclined to think he's clueless rather than dishonest.

The federal government will now buy select surplus agricultural products; "promote" American farm goods (presumably through advertising); and directly subsidize producers. Many of the agricultural products singled out for help are already among the most heavily subsidized in the American economy—corn, wheat, soybeans, rice, cotton. The spending will only intensify farming's dependence on federal aid. But Washington is to blame for that, not farmers. We're confident that if American soybean farmers were given the choice, they'd choose the rescission of tariffs on Chinese goods over another complicated program of governmental largesse.

As Nebraska senator Ben Sasse put it: "This trade war is cutting the legs out from under farmers and the White House's 'plan' is to spend $12 billion on gold crutches. America's farmers don't want to be paid to lose; they want to win by feeding the world. This administration's tariffs and bailouts aren't going to make America great again, they're just going to make it 1929 again."

Agriculture secretary Sonny Perdue downplayed the financial significance of the aid program by saying it's a "short-term solution that will give President Trump and his administration the time to work on long-term trade deals." We are aware of few government measures issued on a "short-term" basis that did not settle in for the long haul. Mexico, China, and the E.U. could lift their sanctions next week, and this executive-branch spending would carry on. Other nations will see this "short-term" program for what it is—a domestic subsidy—and they will impose countervailing duties: i.e., tariffs. The band-aid measure intended to counteract the negative effects of retaliatory tariffs itself becomes a protectionist act against which other nations retaliate. Such is the Pyrrhic logic of trade wars.

President Trump believes such wars are necessary. "Tariffs are the greatest!" he tweeted. "Either a country which has treated the United States unfairly on Trade negotiates a fair deal, or it gets hit with Tariffs. It's as simple as that—and everybody's talking! Remember, we are the 'piggy bank' that's being robbed. All will be Great!"

"He sees himself as a free trader," Larry Kudlow, the president's top economic adviser, said on July 18. Kudlow has had a long career touting the virtues of free trade and limited government. But he's now borrowing the language of protectionism and insisting that Trump's tariffs and subsidies are meant to . . . eliminate tariffs and subsidies. "Let's

have no tariff barriers," Kudlow said, characterizing the president's view. "Let's have no subsidies. Let's have a tariff-free trade system."

But that is not Trump's view. The president is a protectionist true believer, a longtime America Firster who sees global trade as a zero-sum proposition and obsesses about trade deficits.

All of this is made worse by the fact that the Republican party, once full of articulate defenders of free trade and opponents of government bailouts, can't summon the will to oppose this command-economy madness. The GOP controls both the House and Senate and could easily pass legislation giving Congress oversight of the president's tariff measures—which have been enacted under authority Congress loaned the president in 1962 with the Trade Expansion Act. Majority Leader Mitch McConnell, in particular, is not keen on the idea for fear of jeopardizing his narrow margin in the Senate. Politicking over principle, again.

Donald Trump won the presidency with the support of Americans who believed he would bring an end to the inanity and insanity of Washington. An expensive program to offset the ill effects of a bad policy that could easily be revoked? A top trade adviser who didn't think there would be retaliation for a trade war launched by his boss? A longtime free-trader now defending tariffs? A Republican Congress that sits idly by as global trade is undermined? More protectionism to end protectionism?

As Trump asked when he announced his presidential campaign, "How stupid are our leaders? How stupid are these politicians to allow this to happen? How stupid are they?" ♦

CNN Derangement Syndrome

On July 25, White House staff informed a CNN reporter, Kaitlan Collins, that she would not be permitted to attend an open-press availability with President Donald Trump and European Commission president Jean-Claude Juncker. Her offense? While working as pool reporter at an earlier meeting (a small number of "pool" reporters stand in for the wider press corps at some events and share the information gathered), Collins didn't ask questions pertaining to the Trump-Juncker meeting but about Vladimir Putin and the president's former attorney Michael Cohen.

The president's hostility to CNN is well known, and it has intensified recently. Last month, he refused to take a question from the network's reporter in London, and the *New York Times* recently obtained a White House email that mentioned Trump's anger at finding an Air Force One television tuned to CNN.

Press secretary Sarah Huckabee Sanders offered the White House's version of the kerfuffle: "At the conclusion of a press event in the Oval Office a reporter shouted questions and refused to leave despite repeatedly being asked to do so. Subsequently, our staff informed her she was not welcome to participate in the next event, but made clear that any other journalist from her network could attend." According to other reporters in the press pool, Collins spoke neither disrespectfully nor loudly.

Banning a reporter from an open-press White House event is virtually unheard of. We can recall only one—Robert Sherrill, correspondent for the *Nation*, who was denied a security clearance by the Secret Service during the Johnson administration because he had once punched the press secretary for the governor of Florida. Presidents of both parties suffer not just hostile reporters but numerous journalistic crackpots and weirdos attending White House press events. It's part of the job.

We have not seen video of the disputed press pool encounter, but we don't need to. Collins's questions weren't the reason for her disinvitation; her employer was. It's true that Barack Obama regarded Fox News with open contempt and that in one instance his staff attempted to exclude Fox from a press availability with a Treasury official. Fox News anchor Bret Baier remembers it well and remembers also that other networks—including CNN—refused to attend the availability unless Fox was included.

But Obama's disdain doesn't compare with Trump's abhorrence of CNN. The network's programming—from the early morning straight through prime time—is habitually hostile to Trump. And some of its reporters and anchors—Jim Acosta and Chris Cuomo, in particular—have become caricatures of the kind of unthinking bias that contributes to the widespread distrust of the mainstream media. But Trump's obsession with CNN is irrational, and his constant and frequently personal attacks on the organization and its employees are regrettable. Every elected official gets some bad press. No one in the world receives more critical scrutiny than an American president. This is true particularly if the American president makes a habit of saying things that are demonstrably false or deliberately provocative. It's paranoid and puerile to treat one media organization as uniquely guilty of all that's wrong with society.

The president of Fox News, Jay Wallace, said in a statement: "We stand in strong solidarity with CNN for the right to full access for our journalists as part of a free and unfettered press." We're glad he said it. We do, too. ♦

FRED BARNES

He drives them crazy

Devin Nunes (R-Calif.), the chair of the House Intelligence Committee, is an exception to the rule that committee chairs, male or female, are allowed to run things as they choose. Democrats, left-wing groups, and those who obsess about Trump won't let him.

Were Democrats in charge, Nunes would probably be their Target No. 1. His sin was switching the committee's focus from collusion between the Trump campaign and Russian operatives in the 2016 presidential election to finding out why the Trump campaign was being investigated in the first place.

Nunes would like to know why one volunteer adviser to Trump, Carter Page, was wiretapped for a year and another minor aide was sought out by an FBI informant. And a fair question is whether these cases were less a search for evidence of Trump-Russia collusion than a covert way of looking inside the Trump campaign—illegally.

In any case, Democrats are still furious at the committee's change of direction, though it occurred more than a year ago. They'd like to deep-six the investigation entirely. At one time or another, they've called for Nunes to step down as chairman or resign from Congress or just clear out of town.

Since Nunes refuses to back down, Democrats and their allies have been waging a war of abuse, slander, and name-calling. They've tried with occasional success to make his life miserable. Nunes has to be protected by a security detail when he leaves his office.

The mainstream press is no less unfriendly. Even the *Fresno Bee*, his hometown paper, has been harshly critical of Nunes, referring to him as "Trump's stooge." It relies on the favorite claims by Democrats to poison the public's view of what Nunes is doing.

"He certainly isn't representing his Central Valley constituents or Californians, who care much more about health care, jobs, and, yes, protecting Dreamers than about the latest conspiracy theory," the paper wrote in January. "Instead, he's doing dirty work for House Republican leaders trying to protect President Donald Trump in the Russia investigation."

Democrats and their allies have waged a war of abuse, slander, and name-calling against Devin Nunes, who has to be protected by a security detail when he leaves his office.

With that, the *Bee* was just warming up. Nunes aims "to discredit the FBI and distract the public." And he is pursuing this "at the same time special counsel Robert Mueller's probe appears to be picking up steam and focusing on possible obstruction of justice by the president."

When Nunes put out a memo with preliminary findings last winter, Democrats went crazy. It raised questions about the legitimacy of the "Steele dossier," the collection of negative (but unverified) information about Trump that was put together by former British spy Christopher Steele. It was submitted to the Foreign Intelligence Surveillance Court to justify the wiretapping of Carter Page.

The submission was a deceptive document. It masked the fact that the Democratic National Committee and Hillary Clinton's presidential campaign had paid for the dossier—the tab was $168,000—making it a partisan document. This was improper as grounds for a wiretap of an American citizen, a blatant one.

When the Nunes memo was released, House minority leader Nancy Pelosi was joined by Chuck Schumer, the Senate Democratic leader, in freaking out. The memo said the Steele dossier was the key document cited to justify the wiretap of Page.

But what was Schumer doing there? He has enough trouble in the Senate. Did he make a wrong turn in the Capitol? No. The dossier matter was just getting too hot for Democrats. House speaker Paul Ryan backed Nunes, as he has consistently.

And it got hotter when the actual FISA application was released in mid-July, revealing just how much had depended on the hearsay collected by Steele. Nunes and his memo were vindicated.

The mainstream press disagreed, but they're obsessed with driving Trump out of office. Giving credit to Nunes for uncovering alarming holes in the FBI probe and exposing the pro-Democratic tilt of its investigation might help Trump. Can't have that.

Vindication won't spare Nunes harassment by the left. This is what those folks do in their spare time. And complaints to the House Ethics Committee against Nunes are piling up. Three left-wing groups acccused Nunes of making classified information public last year, causing him to step down as chairman for eight months while the ethics committee dawdled before ruling in his favor.

Meanwhile, responses to his tweets pour in. It turns out the anti-Nunes forces are far from witty and a good

LIKENESSES: DAVE CLEGG

number of them think he ought to be in prison. Nunes isn't fazed by dumb tweets or mean charges.

Last week he tweeted this when CNN asked him for a comment: "'CNN's slavish adherence to the Democrats' comical talking points is an amazing sight to behold.' . . . Guess what? They refused to run the statement. . . . This is another great example of 'Fake and fraudulent news.'"

It wasn't easy to pick the best response. The quality was so low. But here it is: "It would be helpful if DN had talking points that were made in America not Russia."

But here's why we should be grateful to Nunes and wise members of the intelligence committee like Chris Stewart from Salt Lake City. We wouldn't know these things if they hadn't dug them up. (1) Hillary and the DNC paid for the still-unverified Steele dossier from his Russian sources. (2) The Steele dossier was largely responsible for approval of the Page wiretap. Well worth knowing, don't you think? ♦

COMMENT ♦ ANDREW FERGUSON

A novel defense of bad social psychology studies—they may not be true, but they *feel* true

Normally a mini-essay by a journeyman reporter for the *New York Times* would not be worth rebutting with another mini-essay. We can all agree that the world has quite enough mini-essays as it is. But the recent piece by science writer Benedict Carey is a landmark in its own small way. It demonstrates two related cultural dilemmas—a crisis in social science, usually called "the replication crisis," and a crisis in the news business, as yet unnamed. And it shows how our "thought leaders" hope to evade both of them.

The only reason anyone pays attention to social psychology is that its findings are supposed to be widely applicable. Otherwise it's unlikely news outlets would write about social science.

The crisis in the social sciences has grown so obvious that even mainstream social scientists have begun to acknowledge it. In the past five years or so, disinterested researchers have reexamined many of the most crucial experiments and findings in social psychology and related fields. A very large percentage of them—as many as two-thirds, by some counts—crumble on close examination. These include such supposedly settled science as "implicit bias," "stereotype threat," "priming," "ego depletion" and many others known to every student of introductory psychology. At the root of the failure are errors of methodology and execution that should have been obvious from the start. Sample sizes are small and poorly selected; statistical manipulations are misunderstood and ill-performed; experiments lack control groups and are poorly designed; data are cherry-picked; and safeguards against researcher bias are ignored. It's a long list.

The second dilemma has to do with the first, though it is less often discussed. The great bulk of journalism—what used to constitute the stuff of a large metropolitan daily newspaper—involves only a handful of general subjects. We read sports, politics, weather, celebrity doings, and pop science. Without them the trade would collapse. Readers and editors alike especially love stories that begin "A new study finds . . . " or "Scientists have discovered . . . " This last sort of news—easily digested findings that *scientifically* explain the mysteries of human behavior—is fed and constantly replenished by the same social science whose elemental assumptions are withering before our eyes. This is bad news for the news.

The circle is vicious indeed. Journalism craves pop-science stories from researchers, who like publicity and must get their work into print, according to the pitiless mandate of publish or perish. The researchers' urgency encourages corner-cutting and conclusion-jumping, which conveniently tend to produce flashy findings, which are inhaled by news outlets, which publish them under the headline "Researchers find!" and then turn back to the researchers to demand more, more, more.

The growing realization of this unhealthy co-dependency is the kind of thing that can ruin a science writer's day—his livelihood, too. For Benedict Carey, the *Times* science writer, the collapse of social psychology is an understandably painful subject. The tone of his mini-essay is mournful, as if he's watching an old friend walk to the electric chair.

He opens his article by mentioning the 50-year-old Stanford Prison Experiment, a simulation designed to prove that people in positions of power are more likely to behave cruelly than the Dorothy Gales among us, the small and meek. The prison experiment, which required psychology students to play-act as prisoners and prison guards, launched a thousand other experiments that used its findings as an unquestioned premise. The unique dangers of power disparities—as

found, for example, in capitalist societies—became a theme of social science, confirming the leftish, class-based politics of social psychologists.

In the last 10 years, thanks to several whistle-blowing researchers working independently, the prison experiment and its findings have been largely discredited. The editor of at least one popular textbook has removed mentions of it. It turns out that the behavior of college students in role-playing exercises under the watchful eye of their professors doesn't tell us much about the behavior of ordinary people in the real world, no matter how powerful or powerless they are. This has surprised social psychologists. Many of them still refuse to believe it.

Carey also mentions another famous, and much cuter, experiment called the Marshmallow Test. It, too, he notes glumly, has been subverted by further examination. In the marshmallow test, young and adorable children were filmed as they tried not to eat marshmallows. The researchers concluded that children who were taught the ability to delay gratification would, thanks to this single trait, grow up to have happier and more successful lives. On the basis of the marshmallow experiment, policymakers over the next generation developed character-building programs that became all the rage in the fad factories of public education. Teach a kid self-control when he's 5, went the thinking, and 20 years later you'll have a college graduate on your hands.

Anyone uncontaminated by social science would understand this proposition to be laughably mechanical and simplistic. And even social scientists are now seeing that the study was severely limited in application. Almost all the kids in the test were white and well-to-do; the results didn't take into account family stability, the level of parents' education, the behavior of peers, or any of the other infinite factors that form a child's character. For nearly 30 years the "marshmallow effect" was science. Now it's folklore.

Carey could have picked dozens of other examples. Every few weeks, it seems, another established truth of social science comes a cropper. But Carey is a man of faith, as believers in social science must be. He doesn't want to let go. He is wounded by critics who think the replication crisis somehow undermines social psychology's standing as science. "On the contrary," he writes. The crisis proves social science is self-correcting, just the way real sciences are.

"Housecleaning is a crucial corrective in science," Carey writes. This is true. He also says "psychology has led by example." This is not true. A science cannot correct itself unless its findings are subjected to replication, but even now such self-examination is rare in social science—indeed, it is often deemed seditious. Reformers and revisionists who question famous findings are subjected to personal and professional abuse from colleagues online and elsewhere.

Still, Carey insists, psychology is a science. It's just not a science in the way that other, fussier sciences are science. "The study of human behavior

will never be as clean as physics or cardiology," he writes. "How could it be?" And *of course* those farfetched experiments aren't like *real* experiments. "Psychology's elaborate simulations are just that."

These are large concessions, but Carey doesn't seem to realize how subversive they are. Those "elaborate simulations" are held up by social scientists as experiments on a par with the controlled experiments of real science. We are told they re-create the various circumstances that human beings find themselves in and react to. The only reason anyone pays attention to social psychology is that its findings are supposed to be widely, even universally, applicable, as the findings of the physical sciences are. Otherwise it's unlikely news outlets would hire reporters to write about social science.

Carey's defense of social psychology fits the current age. It is post-truth, as our public intellectuals like to say. "[Social psychology's] findings are far more accessible and personally relevant to the public than those in most other scientific fields," Carey writes. "The public's judgments matter to the field, too."

Okay, but are the findings true? Carey's answer is: Who cares? The headline over his piece summarizes the point. "Many famous studies of human behavior cannot be reproduced. Even so, they revealed aspects of our inner lives that feel true."

Feeling true is what's important. "It is one thing," Carey goes on, "to frisk the studies appearing almost daily in journals that form the current back-and-forth of behavior research. It is somewhat different to call out experiments that became classics—and world-famous outside of psychology—because they dramatized something people recognized in themselves and in others."

The public likes them. They're famous. They're classics! And they feel true.

Or true-ish, anyway. This is good enough for the *New York Times* and its guardians of science. They have adapted the scientific method to the Trump era. ♦

COMMENT ♦ PHILIP TERZIAN

The one historical sin that's always forgiven

There's a Frida Kahlo exhibition at London's Victoria and Albert Museum, and as such things often do, "Frida Kahlo: Making Her Self Up" (through November 4) tells us something about the culture we inhabit that the curators hadn't intended.

Kahlo (1907-1954) was of course the arch-bohemian Mexican painter and sometime wife of muralist Diego Rivera who came back into fashion some decades after her death and has remained there since. You can measure her current stature either by citing this blockbuster exhibition at the Victoria and Albert or, more pointedly, with the 2002 hagiographical film (*Frida*), directed by Julie Taymor, in which Kahlo was played by Salma Hayek.

Frida Kahlo's unrepentant Stalinism is treated by chroniclers not as an uncomfortable truth, or disturbing moral failure, but as a mild, endearing eccentricity.

I should declare, at the outset, my own bias on the subject. Kahlo's deliberately primitive style is not much to my taste, and her painterly output was comparatively modest. Indeed, as is often the case with cultural icons, much of her appeal to modern enthusiasts has more to do with her own flamboyant self than her merits as an artist. Still, while Kahlo's artistic and personal styles leave me cold, it's not hard to see how others find her appealing.

Kahlo's life was tragic and triumphant: Sexually ambiguous in machismo-ridden Mexico, she contracted polio as a child, was gravely injured as a student in a traffic accident, and suffered from lifelong spinal pain and assorted disorders. Her gangrenous right leg was amputated a year before her premature death. At the same time, she was a notably successful female artist-rebel in a hostile time and place, and as a fervent Mexican nationalist, an equally successful and self-dramatizing character.

Kahlo is probably best remembered for her exuberant dress and accessorizing, based in colorfully retrograde Mexican peasant garb, along with her undisguised facial hair and a famous unibrow. All this has made her not only a posthumous feminist hero but serial inspiration for modern fashion designers—Givenchy, Gaultier, Gucci, etc.—whose clothing lines, needless to say, are priced beyond the means of most indigenous Mexicans.

In that sense, it is worth noting that the Victoria and Albert's "Making Her Self Up" is not a showcase for Kahlo's art—although there are some paintings—but a display of personal objects that helped to form her image: half-empty flasks of makeup, clothing, jewelry, embroidery, her steel prosthetic leg shod in a red leather boot.

In another age, this assortment of homely possessions and intimate items would be seen as a standard collection of saint's relics, reverently displayed for instruction to the faithful. I note also that reviews of the

exhibition, while resolutely secular in tone, are careful to pay homage to Kahlo's status as political icon and social inspiration: A product of Mexico's upper-middle class, her outward identification with that country's *mestizo* population and disdain for her own comfortable origins are described in what amount to religious terms. Like any suitable saint, she suffered for her life and works, which inspire the worshipful.

What is not described, in any detail, are her very specific and fervent political beliefs—and therein lies a tale. For Frida Kahlo, along with Diego Rivera, was a lifelong and pointedly unapologetic left-wing radical and, at various intervals, member of Mexico's Communist party. One of her last works, *Self Portrait with Stalin* (1954), depicts the recently deceased Soviet dictator with the artist modestly arrayed in the foreground. So close, in fact, was Kahlo's identification with communism and so resolute her devotion to Stalin that in 1940 she was briefly suspected by Mexican authorities of complicity in the murder (in Coyoacán near Mexico City) of Stalin's nemesis Leon Trotsky, whose assassin she knew.

Whatever one may think of Frida Kahlo's art and habits, it's hard to avoid the fact that her long and diligent political allegiance was sworn to the service of one of history's most frightening tyrants and mass murderers. The irony, of course, is that if she and Rivera had lived and worked not in Mexico or California or New York, as they did, but in the Soviet Union of their dreams, they would both likely have been arrested, tortured, and killed—as some 20 million subjects of Stalin were dispatched—at their hero's whim.

Yet a curious double standard comes into play here. If Kahlo had been an Italian Fascist and not a Mexican Communist, or an admirer of National Socialism, or anything else on the radical-right spectrum, it's impossible to imagine that such a pertinent detail would be politely dismissed, or casually overlooked, or briefly mentioned in the neutral terms invariably applied to Kahlo's politics.

The *Washington Post*'s feature story about the Victoria and Albert exhibition is typical, in that respect, mentioning her devotion to Stalin's regime in fleeting, even sympathetically contextual, terms:

> [Kahlo] looked to fashion to conceal the deformities on her body wrought by polio and gangrene, as well as to express her allegiance to communism, as in the case of a hammer-and-sickle-adorned corset, one of many she had to wear as a result of a near-fatal accident at 18 involving a bus.

Like her crypto-peasant dresses and shadowy moustache, Frida Kahlo's unrepentant Stalinism is treated by chroniclers not as an uncomfortable truth, or disturbing moral failure, but as a mild, endearing eccentricity. To be sure, it's always difficult to separate artists and their work from personal misbehavior or distasteful opinions. But if one set of historic loyalties—to Franco's Spain, say, or the Confederacy—is enough to toss certain figures beyond the pale, why should another, and considerably more lethal, allegiance be exempt? ♦

Worth Repeating from ***WeeklyStandard.com:***

As for the Russians, NATO was designed to counter Soviet expansion. It was the teeth in a program that included the financial and economic pillars of the Bretton Woods institutions and the Marshall Plan. By organizing and galvanizing a consortium of like-minded nations, NATO accomplished one of the greatest achievements in geopolitical history: the resolution of a major conflict with neither of the primary adversaries firing on one another.

We have sadly arrived at a moment when Russia appears to be a geopolitical adversary once again. There are real questions to be asked of whether the West missed a vital opportunity to help Russia get back on its feet and regain its rightful place as a great power—much as we did after World War II with Germany and Japan. Russia experts can also reasonably debate the wisdom of expanding NATO eastward and even seek to understand the historical importance of Crimea to Moscow.

But the moment when Russia was not seeking to destabilize our way of life has passed. And just as during the Cold War, the NATO alliance under American leadership is the most important institution we have for countering Russian adventurism and revanchism and its desire to once again be a hegemonic power in Europe. . . .

NATO has served us well. It is, by any reckoning, a bargain: By any reasonable measure, the cost of war dwarfs all else.

—Richard Hurowitz, 'What Is NATO For?'

Hacking the Hackers

The former British spy who fingered the Russians.

BY HALEY BYRD

On Friday, July 13, the Justice Department charged 12 Russian military intelligence officials with hacking Democratic National Committee (DNC) and Democratic Congressional Campaign Committee email servers, as well as leaking stolen documents to outlets such as WikiLeaks, in an effort to influence the 2016 presidential election. Among those least surprised by the charges was former British spy Matt Tait. I first met Tait in the fall of 2017, when he was in Washington to be interviewed by special counsel Robert Mueller. The cheerful, lanky 29-year-old does not look or act like someone who is being carefully watched by both U.S. and Russian intelligence communities, nor like someone who has traveled the world as a consultant for technology companies and spent four years working at the U.K.'s digital intelligence agency.

Despite his modest demeanor, Tait was a key player in deciphering Russian election interference: On June 15, 2016, when the first trove of stolen documents from the DNC was leaked online under the pseudonym Guccifer 2.0, before the FBI launched an investigation into election interference, and before the U.S. intelligence community attributed the cyber attacks to the Russian government, Tait used publicly available information to compile incriminating evidence against the GRU (Russian military intelligence), concluding that the attack bore the hallmarks of a classic Russian influence campaign.

The previous day, the *Washington Post* had reported that the security firm Crowdstrike claimed the cyberattacks were carried out over several months by two Russian intelligence groups known as Cozy Bear and Fancy Bear. Tait tells me that a foreign adversary hacking the DNC at first appeared to be routine intelligence-gathering. "They want to know who the next president of the United States might be and who's around her and what her policies are going to be. That's just ordinary espionage." But the dynamic shifted dramatically within a few hours when the Russians, posing as a Romanian hacker, began dumping the documents online. "That was the point where it conspicuously changed from being 'This might be about espionage' to being 'This is clearly an influence campaign,'" Tait says.

Matt '@pwnallthethings' Tait

Using his Twitter account, @pwnallthethings, Tait worked alongside a small group of experts to closely examine the dump and shed light on the motives of its perpetrators. One expert, Thomas Rid, then a professor of war studies at King's College London, wrote an article for *Esquire* detailing how the ragtag group collaborated to piece together identifying information about the Russian hackers. "As soon as Guccifer's files hit the open Internet, an army of investigators—including old-school hackers, former spooks, security consultants, and journalists—descended on the hastily leaked data," Rid wrote. "The result was an unprecedented open-source counterintelligence operation: Never in history was intelligence analysis done so fast, so publicly, and by so many." Rid noted that Tait's work on the issue was "particularly prolific," pointing specifically to Tait's astute observations that the username found in the metadata of one document referenced the founder of the Soviet secret police and that the files had been edited on a computer with Russian language settings.

Tait tweeted at the time that whoever had conducted the DNC hack was doing so in support of Trump, adding that the apparent influence operation marked "another data point in Russian [signals intelligence] strategically leaking data to push a particular narrative." Rid tells me that many in the intelligence community reached the same conclusions, but Tait was one of only a few people in a position to share the facts with the general public. "We had still one foot in the infosec community, but we could also talk publicly without causing any trouble for ourselves with our employers," Rid says. U.S. officials, by contrast, were tight-lipped, waiting until October 2017 to share the intelligence community's assessment that the Russian GRU had been behind the cyberattacks.

Tait recalls being surprised that the hackers didn't simply call it quits, given how quickly they were exposed. "We kind of expected they would just go away," says Tait. "Like, they would say, 'We screwed up. We got caught. This is dreadful. We'll just pretend that this didn't happen and go away back into the night.'" Instead, the Russians doubled down and started to release more documents, only this time they manipulated the metadata in ways specifically designed to discredit Tait's observations. "They intentionally started editing these documents in multiple languages of Microsoft Word," says Tait. Suddenly, files cropped up pointing to countries like China and Cuba instead of Russia. "It

HANNAH YOEST / THE WEEKLY STANDARD

Haley Byrd is a reporter at The Weekly Standard.

was very interesting, because what that showed was they were, in real time, responding to people doing analysis."

Tait's efforts earned him special attention from the Russian government. First, the Guccifer 2.0 account followed him on Twitter. Then, it became clear the Russians were keeping tabs on what he wrote. "You could see the changes to the documents that they were doing were not generic changes, but specifically targeted at my personal analysis," he says. At one point, he came to the realization that "they're actually reading the stuff that I'm writing, and they're interested in discrediting it."

Russian spies weren't the only ones who started following Tait. His Twitter account, previously popular only among a niche audience, took off. He made new connections with people in the cybersecurity field, like Rid, who says the two met for coffee when they realized they were both living in London. "He's very funny and extremely quick on his feet," Rid says. "Intimidatingly smart. It's just good fun to hang out with him, because he's the best kind of a nerd you can find."

Tait grew up in the English city of Chester. After graduating in 2008 from Imperial College London, where he studied computer science and math, Tait joined the U.K.'s top digital intelligence agency, the Government Communications Headquarters. He worked in the computer network exploitation division, which was tasked with hacking operations. His team was only six people, but it was responsible for a large part of the agency's portfolio. Tait recalls working extraordinarily long hours on operations that were "just completely insane. … You can't even imagine the level of planning and precision and sheer mad schemes that they were putting together. And some of them wouldn't work, but some of them would, and it was amazing to see them come to fruition." What kinds of operations? "All operations," Tait answers, sidestepping the question. "Most days I was developing software exploits, breaking into computers." Asked which computers he targeted, Tait smiles wryly. "Foreign ones."

He spent four years at the agency before moving to the private sector, where he worked at Google Project Zero and as a consultant for companies such as Amazon and Microsoft. In 2013, Tait started a Twitter account to counter false information during the fierce online privacy debate sparked by the leak of top-secret documents stolen from the National Security Agency by former contractor Edward Snowden. At the time, Tait was frustrated by reports that made sensationalistic claims contrary to what some of the leaked documents showed. "It was very upsetting to see people I had worked with both in government, but also technology companies, being accused of things that they couldn't respond to," Tait says. His quickly became "the one Twitter account on the entire Internet daring to take the government's side." He kept the account anonymous. "My view was that, in the event that I put my name on it, I would get hounded out of my job in Silicon Valley," Tait says.

Today, he has nearly 130,000 followers and uses his platform to offer intelligence community insights, humorous comments and observations about the news of the day, and in-depth legal commentary; his passion for sharing interesting tidbits from official documents also remains. When he first opened the account, he shared quirky Freedom of Information Act requests, such as Central Intelligence Agency cafeteria complaints, and he combed through the many emails from Hillary Clinton's personal server, offering his followers glimpses into how she ran the State Department.

In the spring of 2016, Tait started contributing to *Lawfare*, an online national security publication founded by Benjamin Wittes of the Brookings Institution and law professors Jack Goldsmith of Harvard and Robert Chesney of the University of Texas at Austin. As a contributing editor, Tait often wrote about the intersection of technology and law enforcement, the DNC hack, and election interference. In June 2017, he published a bombshell account, "The Time I Got Recruited to Collude with the Russians," detailing his interactions with Republican activist Peter Smith, who wanted Tait to verify allegedly deleted emails from Hillary Clinton's personal server that Smith had learned about on "the dark web."

Tait believed that Smith, who touted his relationship with former national security advisor Michael Flynn, was coordinating with the Trump campaign. "In my conversations with Smith and his colleague, I tried to stress this point: If this dark web contact is a front for the Russian government, you really don't want to play this game," wrote Tait. "But they were not discouraged."

Tait's story sparked intense media attention. "My inbox basically blew up," he says, and he was invited to appear on nearly every cable news show (requests he declined). "People met with my accountant. People tried to contact my family," Tait says. Several reporters even showed up at his house in London. Tait's account also caught the attention of Robert Mueller. According to *Business Insider*, Mueller's team interviewed Tait during the fall of 2017 about his dealings with Smith, and he answered questions from the House Intelligence Committee in October. During our interview, Tait declines to discuss details of the ongoing investigation.

Today, Tait is a professor at the University of Texas at Austin's Strauss Center for International Security and Law, where he teaches a graduate course, "Cybersecurity Foundations: Introduction to the Relevant Technology for Law and Policy." He describes the class as "a technical course for students who are not technical" that tackles questions including why cybersecurity vulnerabilities exist, why developers create vulnerabilities, how software can be defended, and how to clean up after someone has broken into a system. Tait notes that his material does not make moral judgments—"It's not saying hackers are good and defenders are bad, because, of course, depending

on the context, it might be the other way round." The objective is for students to become better prepared if and when they encounter cybersecurity issues in the professional world.

"Matt Tait is almost unique in his ability to speak to all of these audiences very intelligently," says Chesney, who also serves as director of the Strauss Center. "Maybe it's his wonderful accent, maybe it's the personal charm. He's a very friendly, funny, and positive person, and those are qualities that make for great teaching on any subject." Chesney says there's a need for students to gain a firm grasp of the fundamentals of cybersecurity. "They need literacy, not fluency. Fluency is great, but we just need lawyers and policymakers to be literate," he says.

Chesney discovered Tait the same way everyone else did: online. "He was becoming somebody you would see as a commentator. It was clear he has a good grasp not just on the technology but on the relevant legal and policy aspects." He thought Tait would be a natural teacher and invited him to join the faculty in 2016.

Nina Guidice, a technology policy student at the LBJ School of Public Affairs at U.T. Austin, took Tait's seminar course in the spring of 2018. She says Tait "taught everything with a sense of humor" and was accessible to students. Another one of Tait's former students, Justin Laden, a J.D. candidate, enjoyed learning key interdisciplinary skills from someone with real-world experience in cybersecurity. Tait is "extremely well-versed in the law," despite not having earned a law degree, he notes.

Asked whether Tait's students were aware of their professor's Twitter fame and involvement in the Russia investigation, Chesney laughs. "A few knew, and some others figured it out along the way, but not everyone really did," he says. "A few were keenly aware what a unique opportunity it is. But especially since he's not 'Professor Pwn All the Things,' he's just plain ol' Professor Tait, it's easy to miss." Tait, content to remain in obscurity, says that's probably for the best. ♦

Spare the Rod (Rosenstein)

The articles of impeachment are a shameful attack on the rule of law. BY JACK GOLDSMITH

The July 25 resolution by 11 House Republicans introducing articles of impeachment against deputy attorney general Rod Rosenstein is not a serious legal document.

It is filled with embarrassing factual errors. Most notably, the fifth article charges Rosenstein with responsibility for the Justice Department's supposed obfuscation of the Steele dossier's origins as opposition research on behalf of the DNC and Hillary Clinton's presidential campaign: "Under Mr. Rosenstein's supervision, Christopher Steele's political opposition research was neither vetted before it was used in October 2016 nor fully revealed to the FISC." The problem is that Rosenstein became deputy attorney general in April 2017, long after the Steele dossier was used in the Carter Page FISA application. He was not, and could not have been, responsible for the alleged obfuscation—an allegation that the recent release of the Carter Page application revealed is baseless.

Rod Rosenstein

JOSHUA ROBERTS / BLOOMBERG / GETTY

The fourth article also contains a factual error. The charge here concerns Rosenstein's failure to give Congress in unredacted form his August 2, 2017, memorandum on the scope of the Mueller investigation. In this context, the article avers: "Mr. Rosenstein's memo raises fundamental concerns related to the government's basis for alleging 'collusion' between the Trump campaign and Russia, and whether these allegations resulted in potential crimes warranting investigation." The Justice Department has not yet alleged anything about the Trump campaign and Russia, much less anything about "collusion." Rather, Rosenstein appointed Mueller to investigate the possibility of "links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump." There is plenty of information in the public record to support the establishment of such an investigation, which despite the articles of impeachment has the support of many Republicans in Congress.

Another indication of the lack of seriousness in the articles of impeachment is the flimsy legal basis for the charges against Rosenstein. There is uncertainty at the margins about what constitutes "high Crimes and Misdemeanors" under the Constitution, but that uncertainty does not extend to the House charges. Most of the charges against Rosenstein concern the Justice Department's supposed failure to respond fully to congressional subpoenas related to the Mueller investigation. Any notion that the constitutional phrase is meant to apply to a dispute about congressional oversight of an ongoing counterintelligence or related criminal law-enforcement investigation by the executive branch is absurd.

The idea is especially absurd because the Justice Department has been more forthcoming to Congress about the Mueller investigation than it has been

Jack Goldsmith, a professor at Harvard Law School and a senior fellow at the Hoover Institution, served as assistant attorney general in the George W. Bush administration.

about any similar ongoing investigation in American history. Such a sensitive investigation would typically be closely held inside the executive branch. The Justice Department would at most turn over to congressional intelligence committees summaries and conclusions about the investigation and, in an extreme case, perhaps a very few primary documents. And it would do so in strict secrecy. Under enormous pressure and in a politically impossible situation, trapped between the overdemanding House Republicans and a railing president, Rosenstein has been generous and transparent in what he has authorized the Department of Justice to disclose. If anything, he has gone too far in compromising traditional executive-branch prerogatives.

Impeachment, moreover, is not an appropriate remedy for Rosenstein's alleged transgression of insufficient transparency. He, after all, works for the president, who is ultimately responsible for the information the Justice Department gives to Congress and who can order Rosenstein to disclose more on threat of removal. Congress is overstepping its authority in micromanaging the executive branch by seeking to impeach an official for refusing to turn over information that the president has not ordered him to turn over. Congress appears to have only once used the impeachment tool against an executive-branch official other than the president—in 1876, when it impeached Secretary of War William Belknap after he resigned for accepting bribes and kickbacks in office.

When Congress is unhappy with the executive branch's refusal to comply fully with a broad subpoena requesting documents about an ongoing investigation, and when negotiations about proper accommodations break down, the usual remedy is to seek to enforce the subpoena in court. The House Republicans have not gone this route, since they would almost certainly lose in court. Their political aims are better served by articles of impeachment than by judicial process.

Which brings us to what is really going on here. The president has been hounding and threatening his deputy attorney general for his part in the Mueller investigation. But Trump has not removed Rosenstein, since doing so would invite political disaster—especially before the midterms. The president's attacks on Rosenstein and others seek to discredit the Mueller investigation in advance of what the president fears will be damaging revelations down the road.

The sloppy articles of impeachment serve the same aim. There is no chance that the House will impeach Rosenstein over these allegations, much less that the Senate would then convict him. But the charges and the threat of proceedings further muddy the waters about the legitimacy of what Mueller is doing and thus the legitimacy of whatever Mueller discloses in the end about the president and his closest advisers.

The articles of impeachment are a shameful, cynical attack on the rule of law. They are all the worse since they come in the context of our government's trying to figure out the undoubted efforts by the Russians to manipulate our democracy in 2016. ♦

The Helsinki Crossroads

Did Trump's coddling of Putin damage his approval rating?

BY DAVID BYLER

On July 16, Donald Trump and Vladimir Putin held a joint press conference in Helsinki, where the American president sided with the Russian dictator over the U.S. intelligence community. Asked about Russian hacks of the Democratic National Committee's server in 2016, Trump said, "My people came to me, Dan Coats and some others, they said they think it's Russia. I have President Putin, he just said it's not Russia. I will say this, I don't see any reason why it would be."

Trump caught widespread flak for his statements, from both his usual opponents and some of his usual allies, and he tried to walk back his statements a day later—claiming that he'd meant to say "wouldn't" instead of "would" and affirming that he believes Russia did interfere with the election. He still insisted, though, that it "could be other people" and that "there was no collusion at all" between his presidential campaign and Moscow. Washington (understandably) spent the rest of the week reacting and re-reacting to the news.

What do the voters think? Is this incident just more of what they've already seen from Trump, or could his coddling of Putin damage his overall approval rating? YouGov, Ipsos, SurveyMonkey, Marist, Quinnipiac, the *Washington Post*, and CBS News have all released polls that asked respondents directly about the Helsinki summit. These show Trump getting middling to low marks.

His best results were in the *Huffington Post*/YouGov and *Axios*/SurveyMonkey polls. YouGov found that 41 percent of Americans approve of Trump's meeting with Putin, 35 percent disapprove, and the rest are unsure. SurveyMonkey found that 40 percent of respondents approve of the way Trump handled the press conference and that 79 percent of Republicans approve.

The *Washington Post*, Ipsos, Marist, Quinnipiac, and CBS News numbers were all much less favorable for Trump. According to an ABC News/*Washington Post* poll, only 33 percent

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of adults approve of Trump's handling of the meeting with Putin, and 50 percent disapprove. More importantly, only 66 percent of Republicans and 58 percent of ideological conservatives approve of Trump's handling of the meeting. Those numbers might seem fine at first glance (they're above 50 percent, after all). But we live in a polarized, hyperpartisan era in which 80 to 90 percent of the GOP approves of Trump's overall job performance. So slipping into the 60s or 70s with Republicans is not a great number for the president.

The CBS News numbers were similar—only 32 percent of its respondents approve of Trump's handling of the meeting, with 68 percent of Republicans approving.

An NPR/*PBS NewsHour*/Marist post-Helsinki poll showed further discontent with Trump—65 percent of registered voters (and 47 percent of Republicans) say Trump was "not tough enough" on Russia at the sumit. According to a Quinnipiac poll, 52 percent of voters see the meeting as a failure for the United States.

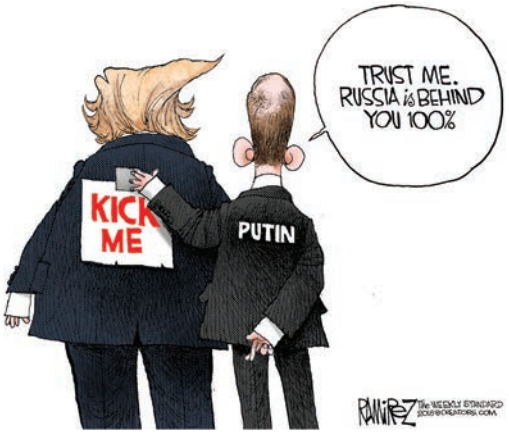
The *Daily Beast*/Ipsos poll had the greatest warning signs: 49 percent say Trump was "too deferential" to Putin and only 26 percent believe the Trump administration could prevent future attacks from Russia.

Despite these tough numbers, the president's overall rating hasn't moved much. Gallup's weekly poll (which ran from Monday the 16th through the 22nd) shows Trump's approval rating at 42 percent. A week earlier Gallup had him at 43 percent. Rasmussen Reports had Trump's approval at 45 percent before Helsinki, and in their first fully post-Helsinki poll they have him at 44 percent. Reuters/Ipsos had Trump's approval rating going slightly up post-Helsinki poll (44 percent among registered voters vs. 41 percent), though a small movement like that could just be noise. YouGov had Trump at 38 percent right after Helsinki (which isn't a great number), but he's bounced around in the surveys YouGov has released since then (its online panel allows it to collect data and publish quickly).

These are not good numbers, but they're not catastrophic.

Trump's approval rating on Helsinki is low, and it lags his overall approval rating (which has been hovering at 43 percent for about a month in the *Real Clear Politics* average). But his issue-specific approval ratings have often been lower than his overall rating.

According to an *Economist*/YouGov poll taken before the Helsinki summit, Trump's job approval among registered voters was just 43 percent. But his approval ratings on gay rights, abortion, the environment, Medicare, Social Security, women's rights, the budget deficit, education, civil rights, health care, gun control, and foreign policy were all under 43 percent. Put simply, Trump's Helsinki numbers were bad, but they were in the neighborhood of his numbers on other important issues.



The polls that allow us to do clean before-and-after comparisons of Trump's approval rating, moreover, don't yet show any big movement for Trump. It's possible that future polls will. But it's just as possible that his showing in Helsinki isn't making much of a dent in Trump's overall approval.

And that is the biggest limitation in this sort of empirical, poll-based analysis: We don't yet know how long the broader Helsinki story (e.g., reactions to Trump's performance, continued discussion about it in the press and Congress, etc.) is going to run. Only a few news stories (the health-care fights of 2017, the tax reform bill, Roy Moore, and James Comey) have really damaged Trump's approval rating, and these have all been part of the news for extended periods of time.

Trump and the GOP, for example, tried to repeal and replace the Affordable Care Act for months in the spring and summer of 2017. Those bills generally polled poorly, and the constant media focus on their failures dragged down Trump's approval rating. Similarly, the GOP tax-reform bill was the subject of a shorter but still notable public debate. The bill seems to have depressed Trump's approval rating at first—though it became significantly more popular after it was passed into law.

The president's approval rating hit its low point in December 2017—right around the time when Republican Roy Moore (who was credibly accused of having improper sexual contact with teenagers while he was in his 30s) was defeated by Democrat Doug Jones in the Alabama special election. Moore was the biggest story in politics for at least two months, and Trump's association with him likely hurt the president's ratings.

Trump also took a hit when he fired FBI director James Comey. But it's hard to disentangle the longer-term effects of the Comey firing from those of other ongoing stories like the health care fight. The Comey storyline, like the others, stayed in the headlines for weeks and seemed to measurably lower Trump's poll numbers.

In each of these cases, Trump's approval rating seems to have responded to sustained negative press coverage. These events hung over Trump throughout most of 2017. And much of the increase in his approval rating since then can be chalked up to their leaving the headlines.

If the Helsinki story sticks around, it could have a similar effect on Trump's numbers. His performance at the summit made him look weak and cut against the perception that Trump is a strong, intelligent leader. More significantly, Helsinki could be another straw on the camel's back: something that doesn't change Trump's approval rating now but inches the broader Russia story closer to a breaking point. ♦

Not Quite Closed

Did the FBI really sever its relationship with Christopher Steele? BY ERIC FELTEN

GARY LOCKE

What exactly does it mean for the FBI to suspend its relationship with a source? What does it mean when that relationship has been "closed"? The answers to those questions may provide insight into whether the FBI and Department of Justice, in their applications for surveillance warrants against Carter Page, were fully forthcoming with the secret federal court that considers such requests.

The Federal Intelligence Surveillance Act documents released on July 21 after a FOIA lawsuit from *USA Today* show the government informing the court that the FBI had "suspended its relationship" with Christopher Steele. Steele is the former British spy who was the Justice Department's "Source #1" for its warrant applications targeting Carter Page. FISA warrants must be renewed every 90 days, and in the first such renewal filing with the court in January 2017, it was revealed that the suspension came after Steele was caught talking to the press, which the FBI had told him not to do.

The FISA filing explains at length why Steele felt driven to break his word: In late October, FBI director James Comey had "sent a letter to the U.S. Congress, which stated that the FBI had learned of new information that might be pertinent to an investigation that the FBI was conducting of Candidate #2." That would be the inquiry into Hillary Clinton and her emails. Comey's action made Steele mad: "Source #1 told the FBI that he/she was frustrated with this action and believed it would likely influence the 2016 U.S. Presidential election."

"In response to Source #1's concerns," reads the January 2017 FISA renewal, "Source #1 independently, and against the prior admonishment from the FBI to speak only with the FBI on this matter, released the reporting discussed herein to an identified news organization." Steele had actually been briefing multiple news outlets on his dossier since September 2016, but it was this late October conversation with *Mother Jones* that got him into trouble.

"Although the FBI continues to assess Source #1's reporting is reliable," the bureau states in the January renewal, "the FBI has suspended its relationship with Source #1 because of this disclosure." And that's that for the warrant application's discussion of Steele.

One might think from this that Steele was a spy left out in the cold. But he wasn't quite the non-grata persona that the warrant application suggests. Indeed, Steele continued to feed his allegations to the FBI—just not directly. The bureau continued to consume those allegations and went to great lengths to deal with Steele without directly talking with him.

Steele found a go-between through whom to maintain contact with the FBI: senior Justice Department official Bruce Ohr, whose wife Nellie Ohr, a Fusion GPS employee, was working with Steele on his dossier. (The dossier work had been contracted by Fusion GPS, which in turn was paid by law firm Perkins Coie; the law firm has acknowledged that the money came from the DNC and the Hillary Clinton campaign.)

Bruce Ohr met repeatedly with Steele. The Justice Department has already turned over to Senate investigators "63 pages of unclassified emails and notes documenting Mr. Ohr's interactions with Mr. Steele." Those materials have yet to be released.

But what we do know is that Ohr passed the details of his conversations with Steele on to the FBI. Ohr's communications with the bureau weren't merely informal chats. They were formal FBI interviews, each subsequently written up in a "302" summary memo. We know this from a detailed letter sent by Senate Judiciary Committee chairman Chuck Grassley to deputy attorney general Rod Rosenstein and FBI director Christopher Wray in early July.

The FBI conducted at least a dozen such interviews with Ohr. The first we know about took place November 22, 2016—just weeks after Steele was caught breaking FBI rules regarding the press. That was followed by interviews December 5 and 12. Those three interviews were summarized by the FBI in a 302 produced December 19.

The FBI interviewed Ohr about Steele's stories again the next day, December 20, an interview memorialized in a 302 dated December 27. And it went on into 2017, with the FBI listening to Steele allegations by way of Ohr three times in January (the 23rd, 25th, and 27th), twice in February (the 6th and 14th), and then three times in May (the 8th, 12th, and 15th).

In April 2017, Justice filed a second renewal of its warrant application against Page. This time, the FBI claimed something more definitive about its relationship with Steele: He hadn't just been "suspended." After repeating the detail about "Source #1's unauthorized disclosure of information to the press" (which had happened back in October), the FBI makes this unequivocal statement in the second renewal application (the emphatic underlining is in the original): "Subsequently, the FBI closed Source #1 as an FBI source."

And yet all the while, the FBI was using an interlocutor (one with a serious conflict of interest) to continue its conversations with Steele.

Asked about Steele's suspension and subsequent "closure" as a source,

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a spokesman for the FBI said that the bureau has no comment.

In the spirit of transparency, Grassley asked in his letter that Justice declassify the Ohr 302s and produce them to the Judiciary Committee by July 20.

The senator is still waiting. ♦

Saturday in the Park

Look at Ozy Fest and despair.

BY MARK HEMINGWAY

New York

There have been a lot of jokes about Ozy Fest, due to its name being oddly similar to Ozzfest, the long-running heavy metal festival founded by Ozzy Osbourne. But maybe it's not entirely a joke—it's easy to imagine crowds like the one in Central Park last Saturday coming together a generation ago, Bic lighters held aloft, to hear their favorite bands, to be entertained, to commune with their fellow fans.

To clear up any confusion, Ozy is an online publication in Mountain View, Calif., just five miles from Google headquarters. Ozy Media, somewhat bizarrely, took its name from the Shelley poem "Ozymandias." If you've forgotten, the poem is about stumbling across the wreck of a fallen empire in a desert (*Look on my Works, ye Mighty, and despair!*). It's bizarrely incongruous with the shameless Silicon Valley optimism that permeates everything Ozy does. Not that the optimism is entirely unwarranted. The day before Ozy Fest, the old-school *New York Daily News* announced mass layoffs. Ozy, on the other hand, seems to go from strength to strength, having settled on the only foolproof model left for funding journalism: hoovering up venture capital from our politically liberal tech overlords.

This year's Ozy Fest was the third such gathering. It promised all the political and intellectual engagement you can handle—provided you could afford the $79 admission. That's just the start, though. There are two further tiers of more expensive VIP tickets, with perks ranging from roving masseuses to what appears to be a table

Jobs and Clinton at Ozy Fest 2018

in one of the restricted tents full of consumer electronics handed out as party favors. It can safely be assumed that dwellers in the ritzy apartment buildings lining the park were all too happy to pay top dollar to see the top speaker, Hillary Clinton.

Ozy Fest has been described by Ozy Media founder Carlos Watson as "TED meets Coachella," which is a sunny way of describing this cultural hell of our own making. Aside from Clinton, such notable figures as the actress and #MeToo icon Rose McGowan, Karl Rove, comedian Chelsea Handler, Democratic National Committee head Tom Perez, and a contestant from *RuPaul's Drag Race* will grace the dais, along with hipster bands Passion Pit and Young the Giant and the rapper Common.

Ozy, to its credit, isn't content to exist entirely in a liberal bubble. In fact, watching the unbalanced Chelsea Handler on stage yelling "Who gives a s—?" at Karl Rove seems like a fiendish plan to make even a crowd full of liberals sympathize with the Republican uber-operative (believed by left-conspiracists to have personally reprogrammed all of Ohio's voting machines in the 2004 election). At one point on Saturday afternoon, there's even an all-GOP panel featuting anti-tax activist Grover Norquist and soon-to-be-ex-congressman Mark Sanford.

Norquist is a veteran of the festival circuit, having gained notoriety as one of the few prominent right-wingers to be a regular at the Burning Man gatherings in the Nevada desert. A former NRA board member, Norquist has carefully honed his pitch to liberal crowds, knowing full well his message of more guns and lower taxes goes down easier if it's paired with his emphatic support of legal weed.

But with Norquist and Sanford's panel sandwiched between a drag queen dating game and an interview with the DNC's Tom Perez, the liberal crowd grows restless. Moderator Fay Schlesinger, Ozy Media's managing editor, gamely tries to engage the crowd by getting Norquist to bash Trump's protectionist trade policies. It's not that Norquist isn't a staunch free trade advocate, but he expends considerable effort correcting Schlesinger's misapprehension of how Trump's tariffs are supposed to work before he can explain what's wrong with them. Sanford shouldn't, in theory, have to prove his bona fides with the crowd. His principled opposition to Trump meant that he lost a Republican primary election earlier this year.

However, as the talk turns to Trump's irresponsible fiscal policy of increased spending paired with tax cuts, you can see the line at the dragonfruit juice stand quickly grow longer. New York liberals don't want to hear Republicans, no matter how critical of Trump they are, tell them that spending restraint is of the utmost importance. The very notion prompts an indignant rant from moderator Schlesinger in the form of a question.

"So what would you cut?" she says to Sanford and Norquist. "Because I

BRAD BARKET / GETTY

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think that's where the solutions really lie. And I'm really curious to see what you think because I agree there is a lot of government spending in the form of contracts for private military contractors and in the form of subsidies for oil companies . . . and there seems to be a lot of emphasis on cutting social programs that Americans have paid into. I look at my checks every two weeks, and I pay a lot of money into Social Security and Medicare, and when you have lawmakers specifically targeting those issues . . . that message is something very negative to the American people."

Norquist, perhaps not wanting to completely alienate the crowd, cheerfully stumbles through an answer about the difficulty of entitlement reform, but doesn't get at the fundamental feebleness of Schlesinger's premise. Credible estimates of the unfunded liabilities of America's entitlement programs range from about $30 trillion to $130 trillion. No other line of federal spending, let alone comparatively trifling spending on oil subsidies and Pizza Huts at military installations in Afghanistan, represents more than a drop in this bucket. Further, this crushing debt is the result of Americans not paying into these programs nearly as much as they take out. Schlesinger gets loud applause nonetheless.

Sanford and Norquist clear the stage for the DNC's Tom Perez, who's being interviewed by CNN's Dana Bash. Bash asks Perez a series of tough questions about the electoral viability of the sharp ideological turn to the left among certain Democratic candidates and voters. Perez deftly dodges them. On the one hand, the math behind the "Medicare for All" that the left keeps demanding is impossible. On the other, all of the organizing energy for Democrats is among people who buy into this fantasy. Fortunately for Perez, he can find common ground on another topic. Russia has gone from a place on the map to a sort of political incantation.

"Russia is our most serious adversary. [Trump] should be up there demanding action. [Trump] should have handed the indictments to Putin. He should be holding them accountable, whether it's Crimea, whether it's Ukraine, whether it's the interference in our democracy," says an impassioned Perez. Without letting Trump off the hook for the troubling tongue baths he's given Putin, in terms of actual policy, the lack of action on all of these issues is a big indictment of the previous administration as well, never mind the irony of Obama's secretary of Labor repeating Mitt Romney's 2012 foreign policy talking points.

But ultimately, the workaday partisan concerns of Perez and some token Republicans can't begin to generate the enthusiasm the crowd has for Rose McGowan. The former star of *Charmed* and *Grindhouse* has become a figure of cultural importance in the wake of her battle against accused Hollywood rapist Harvey Weinstein. She speaks with the passion of a woman who has been liberated, and nearly every remark is greeted by whoops and hollers.

Her story is a bracing one. Long before she was abused in Hollywood, she was raised in a cult that sexualized children. She pulls no punches, telling the crowd flatly that Weinstein was hard to bring to justice because "Democrats protected him." She also spins a conspiracy theory (featuring ex-Mossad agents) about her bust for cocaine possession on a flight to appear at the Women's March in D.C. last year. McGowan is received as a hero, however imperfect.

Coming not long after McGowan's testimony, however, there's also a hero's welcome for the day's headliner, Hillary Clinton. If you sense a jarring juxtaposition between the expressions of support for McGowan and a woman who was involved in shutting up women who accused her powerful husband of sexual harassment and worse—well, shut up and enjoy your free massage and dragonfruit juice.

Clinton seems happy and relaxed and is no doubt comfortable, wearing an exceedingly billowy outfit that sparks a lot of chatter because no one can quite describe it. Caftan? Muumuu? She cut a hole for her head in the expensive top sheet from wherever she slept in the Hamptons the previous night? Of course, she has no reason not to be at ease. She's being interviewed by Laurene Powell Jobs, the stunning billionaire widow of the late iPhone inventor and, not coincidentally, an investor in Ozy Media. Mrs. Jobs has no intention of getting Mrs. Clinton to bare her soul.

When someone from the crowd yells something about the popular vote winner being prevented from becoming president, Jobs stops and addresses the point directly. "We should talk later about changing the Electoral College. I appreciate it, and as a Californian I would like my vote to count," she says to cheers, though it's hard to imagine finding much nationwide sympathy for the fact that the Constitution is limiting the political influence of rich Californians.

Perhaps because Jobs is lobbing them slow and over the middle, Clinton lets the political mask drop a bit. Once she gets through the predictable complaints about Russia, she speaks with disarming warmth, particularly about the effects of Trump's immigration policy. "We have decades and decades of proof that absorbing immigrants, creating opportunities . . . and opening the doors has been to our advantage," she says. And when she appeals for help in her efforts to get airline flights to reunite families separated by Trump's immigration enforcement policies, the crowd seems genuinely moved.

But if it's unclear what the point of all this is, at the end of the panel the stage opens up behind Jobs and Clinton and a carefully edited video presentation highlights and tallies the thousands of #resistance efforts and marches in states across the country. Many people have paid good money to attend what is ultimately an elaborate attempt to make Clinton feel better about failing to campaign in Wisconsin. Though not everyone is part of the support group: A heckler can be heard bellowing, "Lock her up!"

If outdoor political gatherings and intellectual-ish panel discussions are becoming the arena rock of the 21st century, the guy in the back of the crowd yelling "lock her up" is the drunk fan at every concert demanding a replay of the Lynyrd Skynyrd classic: "Free Bird!" ♦

In Defense of FISA

Applying checks and balances to our government's surveillance activities was the right idea. But who will oversee the overseers?

By April Doss

In September 2005, I sat in a small, windowless office with musty carpeting on the eighth floor of the Ops2B building at the National Security Agency's headquarters in Fort Meade, Maryland. I'd been working at the agency for two years, a career shift that I, like so many others, made after the terrorist attacks of September 11, 2001. Although I had a law degree, my first job at the agency had been in the office of policy. Two years later, I'd switched to this new role at the NSA Office of General Counsel as an operations attorney, part of a group of lawyers that advised the NSA's analysts and information collectors on the authorities and restrictions that governed their work. We were also responsible for all of the filings with the Foreign Intelligence Surveillance Court (FISC) and worked closely with the Department of Justice drafting the pleadings requesting authority to carry out electronic surveillance.

"Here," my boss said that morning. He gestured to a stack of books on a particle-board bookshelf. "Start here." The books he pointed to were Government Printing Office volumes of the proceedings of the Church Committee, which in 1975 had investigated the U.S. intelligence community's surveillance of Americans.

I had a top-secret clearance already; I'd been working closely with the NSA's operational units for two years; and I was generally familiar with what I would come to think of as the NSA's bedtime stories: the stories that were repeated every single year in our required intelligence oversight training, the stories of intelligence community excesses, like the NSA's own participation in Operation SHAMROCK, which had intercepted and read telegrams to and from individuals in the United States for 30 years, from World War II through the 1970s. Against that backdrop, I wasn't sure why he wanted me to read these dog-eared, decades-old reports.

"You'd be surprised," he said, "how relevant these volumes still are today. Read these, then read the FISA [Foreign Intelligence Surveillance Act] statute and the FISA minimization procedures. Then we'll put you to work."

As I sat at my desk thumbing through the six volumes of the report and seven volumes of hearings, I was struck by just how significant the Church Committee findings still were in 2005. And as news reports unfolded in July 2018 about the release of the Carter Page FISA documents—the first-ever declassification of this kind of government application—I couldn't help but think about the enduring lessons of the Church Committee: what the committee's proceedings explained about the creation of FISA, how the law has evolved, and how politics has always played a role in shaping electronic surveillance law, albeit in different ways during different decades.

Historical comparisons are fraught with opportunities for inaccuracy, but by all accounts the late 1960s and early 1970s were an era in which there was as much social division as there has been from 2016 to the present. The culture wars then were shaped by antiwar protests and the civil rights movement, and more than a few government agencies mistook internal protest for national security threats. By the late 1970s, there had been a flood of allegations that led to the formation of a Senate committee (and a parallel one in the House) to investigate "the extent, if any, to which illegal, improper, or unethical activities were engaged in by any agency of the Federal Government," all with an eye toward the critical principle that "the preservation of liberty requires the restraint of laws, and not simply the good intentions of men." In its investigation of NSA activities in particular, the committee noted:

> It has the capacity to monitor the private communications of American citizens without the use of a "bug" or "tap." The interception of international communications signals sent through the air is the job of NSA; and, thanks to modern technological developments, it does its job very well. The danger lies in the ability of the NSA to turn its awesome technology against domestic communications.

The committee delved into abuses by the Federal Bureau of Investigation (FBI), the Central Inteligence Agency (CIA), and the Defense Intelligence Agency (DIA). And—relevant to the later FISA legislation—the committee

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noted that it was deeply concerned about interception of domestic communications by the NSA and by the fact that, at the time, the NSA operated under an executive branch charter, without a statutory authorization or framework for its intelligence activities.

As the lengthy public hearings of the Church Committee wore on, a consensus began to form that, while it was necessary to implement reforms within the intelligence community, executive branch changes alone wouldn't be enough. President Gerald Ford signed the executive order that would serve as the predecessor to the current EO 12333, defining the lanes in the road traveled by various agents of the intelligence community and, for the first time, requiring attorney-general-approved guidelines for the collection, retention, and dissemination of information involving U.S. persons.

Shortly afterwards, Congress debated new legislation titled the Foreign Intelligence Surveillance Act, designed to constrain electronic surveillance in ways that would protect the privacy interests of U.S. persons, restrict the government's ability to surveil U.S. persons for intelligence purposes, comport with the principles of the Fourth Amendment, and generally raise the bar for wiretapping carried out for intelligence purposes to a level of scrutiny and rigor that was closer to the set of standards that the government had to meet for criminal wiretaps under Supreme Court case law.

A meeting of the Senate's Church Committee, February 6, 1975 (clockwise from lower left): Gary Hart (D-Colo.), an unidentified stenographer, Richard Schweiker (R-Pa.), Robert Morgan (D-N.C., partly hidden), Walter Mondale (D-Minn.), Charles Mathias (R-Md.), Barry Goldwater (R-Ariz.), Howard Baker (R-Tenn.), John Tower (R-Texas), and committee chairman Frank Church (D-Idaho)

HENRY GRIFFIN / AP

The legislative history of the House Permanent Select Committee on Intelligence's (HPSCI) FISA hearings contained a lengthy exploration of the history of wiretapping in the United States, with a particular focus on the activities of the Federal Bureau of Investigation. It was clear that the HPSCI considered the FBI's latitude too broad, whether it was acting on its own initiative or instituting wiretaps at the president's behest. At the same time, the HPSCI pointed to the mere existence of the CIA and other intelligence agencies as proof of Congress's authority to legislate electronic surveillance for national security purposes. In the view of the House report, while the president's Article II powers previously had been (and would continue to be) invoked to justify intelligence-gathering activities of all kinds, the fact that Congress authorized and appropriated funds for agencies like the CIA led to the logical conclusion that it, too, had authority over foreign intelligence matters.

There was robust debate over what shape electronic surveillance legislation might take. In the end, what Congress devised was a law as complicated as the questions it was trying to address, and as flawed as any legal structure with a limited ability to keep pace with changes in technology. Congress's aim was to strike a balance between national security and privacy and to ensure that electronic surveillance could be carried out when the need for intelligence outweighed privacy concerns. A number of dissenters expressed concern about whether it was appropriate for judges to have any role in national security at all—it fell outside the Article III remit, and judges would not be as familiar with intelligence techniques as Congress. However, HPSCI's report concluded, "Whenever an electronic surveillance for foreign intelligence purposes may involve the fourth amendment rights of any U.S. person, approval for such a surveillance should come from a neutral and impartial magistrate." HPSCI noted the benefits to this approach and even anticipated the potential problem that a court might merely serve as a rubber stamp:

> By requiring a judge ultimately to approve foreign intelligence electronic surveillances, the bill would require the responsible officials in the executive branch to consider and articulate the facts and their appraisal of the facts. If the executive officials were the approving authority, the same consideration and articulation would not be as likely to occur. The experience under [the Wiretap Act] is instructive. While few orders for law enforcement electronic surveillance have been denied, the committee believes that the reason is the care and scrutiny which applications receive before they ever go to a judge. The institutional response to an outside approval authority, then, is to make every effort that only good applications should go to the approval authority.

On that basis, Congress took the extraordinary step of establishing a special federal court, staffed by sitting federal judges, that would conduct its proceedings based on some of the most highly classified information in the government's possession and that would exercise both soft and hard power to keep the government honest. The soft power rested in the unwritten assumption that the FBI, CIA, NSA, and Justice Department would ensure that applications to the FISC were sound, well-supported, well-reasoned, and met the requirements of the statute—and consequently that those applications would be worthy of approval, either on their face or after some revisions, in nearly all cases. And the hard power would lie in the FISC's enforcement abilities: For every order signed by the FISC, the court had the authority to require that the government demonstrate compliance with the terms and conditions of the order. That meant the government would have to report any instances of noncompliance with the minimization procedures, and the court would have broad authority to require the government to undertake corrective measures—even if they were costly ones and even if it meant terminating surveillance.

Congress has never been able to get away from the original FISA framework, even as technology and telecommunications have evolved and the law has been amended with odd appendages, like ramshackle additions on a house that weren't planned by an architect.

This complicated statute has a number of features that merit attention, from the four-part definition of what precisely constitutes "electronic surveillance" under the law to the perilous decision to tie that definition to specific technologies that existed in 1978. Congress has never been able to get away from that framework, even as technology and telecommunications have evolved and the law has been amended like a house with ramshackle additions that weren't planned by an architect; they serve their function but with odd mismatches that betray them as afterthoughts.

Congress hoped it could curb abuses and restore public trust by creating a framework for domestic electronic surveillance in which the Fourth Amendment rights of U.S. persons would be protected and all three branches of government would play vital roles in authorization, operations, and oversight. Congress even thought it had the leak problem solved. According to the HPSCI report, "One need only read the newspapers to realize that a primary cause of 'leaks' is the uncertainty as to the legality and propriety of various intelligence activities." It was HPSCI's hope that "by eliminating that uncertainty with respect to foreign intelligence electronic surveillances, this bill will go a long way to stemming 'leaks.'"

On July 21, 2018, the Department of Justice took the unprecedented step of releasing declassified, redacted versions of FISA applications—an initiation and three renewals—for electronic surveillance of the United States person Carter Page. Page had at one time been a foreign-policy adviser to presidential candidate Donald Trump. Page had also previously lived in Russia, where he worked as an energy consultant. More significantly, in terms of potentially sketchy ties to Russia, Page had been in contact with two men who were later indicted on charges of being Russian spies. It was these interactions that first brought Page to the attention of the FBI—and indeed, these interactions were among the facts cited in the FBI's statement of facts alleging probable cause to believe that Page was acting as an agent of a foreign power.

The Page FISA applications have been the source of ongoing controversy ever since March 4, 2017, when President Trump first tweeted that under the Obama administration, he had his "wires tapped" in Trump Tower. Of course, at the time no one outside the national security community had any inkling what he was talking about. There was lots of speculation about whether he was referring to phone calls his national security adviser, Mike Flynn, had with Russian ambassador Sergey Kislyak—a series of communications which Flynn, a retired Army general, would later lie about, leading to the criminal charges to which he would plead guilty. In hindsight, as garbled as Trump's wiretap tweet was, one has to wonder if he hadn't just found out about the surveillance of Carter Page.

What we now know from the declassified documents is that the FBI submitted the Page application to the FISC in October 2016, after Page had left the campaign. During the summer of 2016, news outlets had reported on a speech that Page made in Moscow that was highly critical of the United States and on Page's ties to prominent Russian figures with connections to the Kremlin. It sounded entirely too reminiscent of the heat the Trump campaign was taking in the press for the ties its campaign chairman, Paul Manafort, had to shady Russian oligarchs. By September 2016, both Manafort and Page had left the Trump campaign.

In October, the FBI noted a string of activities that raised concerns about Russian interference in the 2016 presidential election. These were laid out in the initial application: The FBI described Russia's clandestine intelligence activities; its historical attempts to interfere in U.S. elections; its particular efforts to interfere in the 2016

election—including the cyberattack on the DNC and the release of hacked emails by WikiLeaks—and the intelligence community's joint assessment, a version of which was released to the public on October 7, 2016, concluding that the intelligence community was confident that Russia's senior-most officials directed the targeting of the DNC.

Although Page had left the campaign, the FBI feared Russia was using him for its own purposes. The application states that the FBI alleged there was probable cause to believe Page was an agent of a foreign power under a specific provision of FISA that involves knowingly aiding, abetting, or knowingly conspiring to assist a foreign power with clandestine intelligence gathering activities, engage in clandestine intelligence gathering at the behest of a foreign power, or participate in sabotage or international terrorism or planning or preparation therefor.

The FBI then laid out its case. Many of the details specific to Page in the initial application are redacted. However, it appears to be a chronological narrative that includes references to Page's years in Moscow in the early 2000s as well as a discussion of Page's interactions with three intelligence officers of the Russian SVR (the country's CIA equivalent), all of whom were indicted in the United States for various crimes that amounted to spying for Russia. Two of the SVR agents fled the country, and the third was convicted of conspiracy to act as an unregistered agent of a foreign government and sentenced to 30 months in prison. (These charges, coincidentally, are the same ones leveled against Maria Butina, who is in custody and awaiting further criminal proceedings in the U.S. district court in Washington.)

At this point in the application, the narrative shifts to Page's actions during the campaign, in particular his July 2016 trip to Moscow to speak at the New Economic School, where, according to the FBI application and the now-infamous Steele dossier, Page met with high-ranking Russian government officials. It's this portion of the application that has engendered the greatest controversy. In January and February 2018, the HPSCI—the same committee that had so soberly and thoughtfully laid out a balanced structure for oversight of electronic surveillance activities—exploded into a chaos of dysfunction.

The HPSCI had been operating as a bit of a circus from the beginning of its Russia investigation in early 2017, with Chairman Devin Nunes (R-Calif.) lobbing wild accusations about the unmasking of the identities of U.S. citizens in intelligence reporting by Obama administration officials—a series of accusations that led Nunes to make bizarre late-night trips to the White House and convene press conferences on the White House lawn. Nunes briefly recused himself, although it was unclear just how distant he remained from the HPSCI majority's efforts during the investigation. Despite the constant sense that this once-sober committee was on the verge of running off the rails, it managed to cling to just enough credibility to stay on track until the winter of 2018, when Nunes insisted on releasing a memo that endorsed a new conspiracy theory about how a Democratic administration had: abused the FISA process by using salacious opposition research (with the implication that the funding source made the information itself suspect), incorporated that suspect research into a FISA application, and sent the application to the secret proceedings of the FISC without telling the court there could be bias in the information. Through this complicated string of subterfuges, Nunes claims, the Democrats managed to pervert justice in order to spy on the Trump campaign.

Republicans Devin Nunes, right, and Peter King leave the House Intelligence Committee's secure meeting rooms, February 6, 2018.

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Over time, the conspiracy theory would deepen: Since the dossier included information from sources in Russia, that meant that the Hillary for America campaign had colluded with Russia to provide fake information to Christopher Steele, who slipped the fake news to the FBI, which then pulled the wool over the eyes of a succession of four FISC judges, each of whom signed off on further surveillance against Carter Page.

It's an exhausting theory to contemplate, and yet one that many people, fueled by conspiracy-mongering rumors on the Internet about the workings of the "deep state," believed. What the newly released documents show is that the theory is utterly bunk.

On page 15 of the initial application, the FBI offers a lengthy explanation of the sourcing of information about Page's 2016 trip to Moscow. In sum, the Steele dossier was only one part of the case against Page and only one part of

the dossier was cited; it focused on a single event against a much larger background of Russian activities and Page's own activities and interactions with indicted and convicted Russian spies. Page was, after all, a man who had boasted in a 2013 letter that he was an informal adviser to the Kremlin.

So against this fuller background of facts (not the complete facts, since the released applications are full of redactions, and since there may be other facts that haven't yet come to light), it is apparent that the FBI would have been derelict in its duty if it didn't at least investigate whether there was cause for concern. Page had longstanding ties to Russia, including past ties to indicted and convicted Russian spies; the intelligence community had concluded that Russia was undertaking active measures to influence the 2016 U.S. election; and Page made a trip to Russia, possibly meeting with Kremlin officials, while he was an adviser to Donald Trump's campaign. Taken together, it appears to be probable cause.

In a tantalizing partial sentence, the FISA application states that "the FBI believes that the Russian government's efforts are being coordinated with Page and perhaps other individuals associated with Candidate #1's campaign"; the rest of the sentence trails off into a lengthy redaction.

The full 412 pages of the application and its three renewals follow much the same pattern. The FBI explains the context, the foreign power, and why it's concerned about Page in particular. It describes the nature of the source information and the status of the FBI's relationship with the source as well as its confidence in his reliability, pointing out that the FBI did indeed tell the FISC about this potential bias in lengthy footnotes in all four applications that explained that a U.S. law firm (now known to be Perkins Coie) had hired a U.S. person (who we now know is Glenn Simpson) "to conduct research into Candidate #1's ties to Russia." Per the footnote, that U.S. person then hired "Source #1" (Steele). Although the FBI didn't believe Steele was aware of who had originated this request or for precisely what purpose, it noted in the first application, "The FBI speculates that the identified U.S. person [who hired Steele] was likely looking for information that could be used to discredit Candidate #1's campaign." The later applications explain that the FBI severed its relationship with Steele because, after giving his information to the FBI, he had also talked to the press. However, per the applications, "notwithstanding Source #1's reason for conducting the research," because of Steele's past reliability in providing useful and accurate information, "the FBI believes Source #1's information herein to be credible."

From all of this, somehow, Devin Nunes spun a crazy conspiracy narrative. Now that the underlying FISA documents have been released, that narrative—along with the HPSCI—is falling apart.

When the HPSCI issued its legislative report on the proposed FISA law, it wrote at length about the risks of an unchecked, unsupervised executive using surveillance tools against U.S. persons in ways that ran afoul of the Constitution and the values of the nation. It also examined the potential risks of including the judicial branch in the national security decision-making process. What HPSCI was apparently blind to was the risk to the nation posed by a legislative branch that itself has run amok.

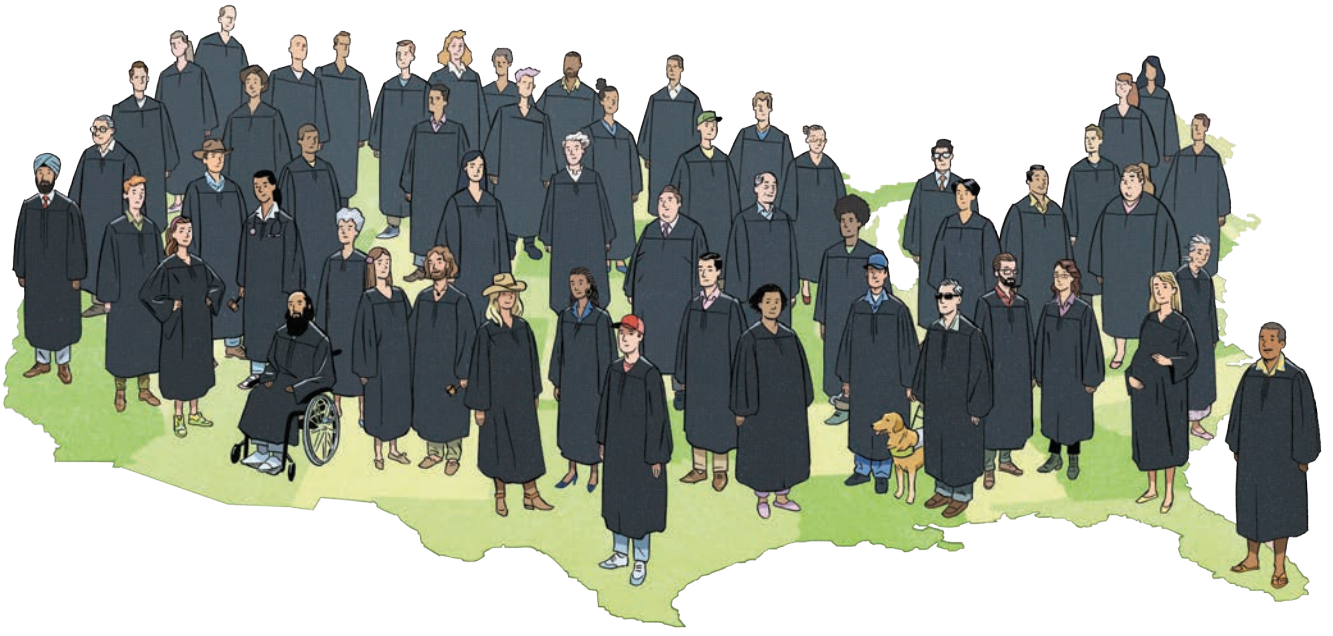
Not all of Congress is dysfunctional, and the Senate Intelligence Committee (the Church Committee's descendant) is functioning in a far more robust, bipartisan way than anything we've seen in the House during this Congress. Nonetheless, the actions of HPSCI—one committee in one chamber of a three-branch government—are doing real harm. The Nunes memo has formed the basis for talking points that seek to discredit not just these particular FISA applications but the entire FISA process, and it attempts to undermine any notion that Russia tried to interfere with U.S. elections.

In 2005, when I sat at a desk thumbing through the pages of the Church Committee report, I had no way of knowing how consequential its findings—already a quarter-century old—would be 15 years later. It's still essential for the intelligence community to be subject to meaningful oversight and constraints. And all three branches of government have an important role to play in that process.

In 1976, in his letter of transmittal accompanying his committee's report, Frank Church wrote:

> The root cause of the excesses which our record amply demonstrates has been failure to apply the wisdom of the constitutional system of checks and balances to intelligence activities. . . . The founding fathers foresaw excess as the inevitable consequence of granting any part of government unchecked power. This has been demonstrated in the intelligence field where, too often, constitutional principles were subordinated to a pragmatic course of permitting desired ends to dictate and justify improper means.

There's ample reason to believe that collateral benefit will come from the release of the Carter Page application: The public is seeing, for the first time, what a Title I FISA application looks like, which in many respects is a win for transparency. There are downsides as well, of course, including the publication of allegations about an individual (Carter Page)—even one who seems more than willing to discuss these matters publicly himself. Worse still is the damage done by Devin Nunes's actions, and the hype surrounding them, to public confidence in the FISA legislative framework, in the FISC as a body, and in the FISA application process as a whole. This time, it isn't the executive branch whose actions need to be checked. It's Congress that needs to rein itself in. ♦



Our Constitutional Moment

On the special counsel, presidential pardons, and impeachment, the most important decisions will be rendered not by judges or senators but by the American people

By Adam J. White

We are having a "constitutional moment," so to speak, in two parts. The first is obvious and momentous; the second is less obvious, but perhaps even more significant. The first is Justice Anthony Kennedy's retirement and the fight to confirm his successor; the second is a slow-motion collision of profound constitutional powers: those of prosecution, pardon, and impeachment. For the first, we are mainly spectators; the second will call ultimately for our own deliberation and decision.

Justice Kennedy's retirement sparked a national conversation—shouting match, really—over the Court and the Constitution. Of course, every Supreme Court vacancy in the post-Bork era sparks intense argument. The late Justice Antonin Scalia warned, in *Planned Parenthood* v. *Casey* (1992), that Supreme Court appointments will necessarily be controversial so long as the Court's work entails making value judgments on behalf of the nation:

> If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*. Not only that, but confirmation hearings for new Justices *should* deteriorate into question and answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward.

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ILLUSTRATIONS BY JORI BOLTON

But whatever the baseline for Supreme Court confirmation acrimony might now be, the fight for Kennedy's vacant seat will surpass it. President Donald Trump is replacing the Court's longtime "swing justice," which will shift the Court's ideological center of gravity on at least some significant issues. Even in tranquil times, this nomination would be a political knife fight. In the most venomous political year of recent memory, this nomination could become even bloodier, capable of exceeding in rancor even the attempted "high-tech lynching" of Clarence Thomas and the successful character assassination of Robert Bork.

Indeed, President Trump had not even announced his nomination of Brett Kavanaugh when the *New York Times* called upon "Democrats and progressives to take a page from 'The Godfather' and go to the mattresses on" the not-yet-announced nomination. Perhaps the *Times* deserves credit for understatement; mob warfare may understate the partisan furies that will be unleashed upon Kavanaugh.

Still, we should not let the worst aspects of the confirmation process overshadow its best aspects. Each Supreme Court vacancy is an occasion for the nominee, the president, and the senators to look squarely at the Court's role in our constitutional republic. And though each confirmation hearing tends to focus greatly on familiar disputes—as always, *Roe* v. *Wade*—the senators inevitably invoke current controversies in their rhetorical questions to the nominee. Thus, each nomination is a product of its time—the John Roberts and Samuel Alito hearings raised post-9/11 questions of presidential powers in wartime; the Elena Kagan and Sonia Sotomayor hearings raised questions of campaign-finance reform; the Neil Gorsuch hearing raised questions of religious liberty and, as usual, of Donald Trump. In that respect, Supreme Court confirmation hearings remind us that our momentary political debates ride atop deeper, timeless constitutional debates; a Supreme Court nomination provides the opportunity for the senators and all of us to focus on those deeper themes.

And while we may complain that judges play an outsized role in American politics, the fact remains that we put them at the center of our constitutional debates. For even those of us who bristle at the notion of "judicial supremacy" tend to invoke judicial authority in support of our own constitutional arguments—we always have. Nearly two centuries ago, when Alexis de Tocqueville studied American democracy, he observed that there is "no political event in which [one] does not hear the authority of the judge invoked." Yes, nearly all political questions are eventually resolved into judicial questions, as Tocqueville famously observed. But even before those questions reach the courts, we invoke the authoritative views of judges. Which, in turn, vests those judges with political authority.

And so the public will watch as the president and Senate choose the next justice who will, with his colleagues on the Court, have the final word on nearly all of the most important constitutional issues of our time. We can hope that the president and senators approach the task with the high-mindedness that it deserves. But in this constitutional moment, as the Senate weighs the president's choice, we are little more than spectators . . .

. . . Unlike the other part of our constitutional moment, in which we won't have the luxury of watching the game from the sidelines. Rather, the American people themselves will be responsible for rendering the final judgment.

For over a year, we have watched three constitutional debates slowly unfold. First, there is the investigation by Robert Mueller, the Justice Department's special counsel, raising difficult questions of whether the prosecutor can subpoena or even indict the president. Second, there is President Trump's invocation and use of his constitutional power to pardon, raising unsettling questions of whether the president can use the pardon power tactically to thwart an investigation of himself or even to pardon himself. And third, there is the specter of impeachment, raised by congressmen and activists who hope that Democrats will win control of the House of Representatives this fall.

Each of these issues—prosecution, pardon, and impeachment—is constitutional but not *legalistic*. Each involves legal authorities that are not defined precisely and therefore turns significantly on the relevant actors' prudential and ethical judgments, not just their legal judgments.

More and more, we hear these debates described in terms of "constitutional crisis." That term means different things to different people but at its core it reflects public unease with a conflict among government officers or institutions that lacks an obvious mechanism for resolution—which means, more precisely, a conflict that will not be resolved by the courts with the acquiescence of the warring parties.

But what that really means, in turn, is that it is a conflict that can be resolved only after the fact, at the ballot box, by us—a rare opportunity for the people themselves to make decisive constitutional judgments on questions of consequence. If we see such an opportunity as a constitutional "crisis," then this says less about the warring government factions than it does about ourselves and our capacity to make collective, deliberate constitutional judgments instead of leaving them to federal judges to decide for us.

'I have the absolute right to PARDON myself," the president tweeted on June 4. Then he added, "but why would I do that when I have done nothing wrong?"

His caveat offered little assurance to his critics, who from the outset of his presidency have worried that the president will use the pardon power tactically—either

to advance his political agenda or to insulate himself against investigations by pardoning people close to him—or perhaps even take the unprecedented step of pardoning himself.

So far President Trump has granted seven pardons. The fifth was of Dinesh D'Souza, the political activist who broke federal campaign-finance laws by funneling $20,000 in campaign contributions through other people to a Republican Senate candidate. Trump pardoned him just in time for the release of D'Souza's latest film, *Death of a Nation*, which compares Trump to Lincoln. But Trump's first and most controversial pardon was of Joe Arpaio, former sheriff of Arizona's Maricopa County, whose longtime record of aggressive and abusive actions against Hispanics and immigrants led to his federal conviction for contempt of court in July 2017. A month after Arpaio's conviction, President Trump pardoned him.

Trump's pardons of Arpaio and D'Souza were unsettling; their convictions and sentences were well justified, and their pardons seemed to reflect sheer politicking. But the pardons also raised concerns that President Trump was pardoning political allies to send a message to friends and former associates, such as his campaign chairman Paul Manafort, to "hang tough" in their own criminal proceedings rather than turning against the president.

President Trump's own legal team has done little to dispel such concerns. When asked in June whether the president could someday pardon Manafort if he were to be convicted in the course of the Robert Mueller probe, Rudy Giuliani told CNN, "When it's over, hey, he's the president of the United States, he retains his pardon power, nobody's taking that away from him. . . . I couldn't, and I don't want to take any prerogatives away from him." This evidently reflected the legal team's longtime position: In June, the *New York Times* released a January 2018 memo from Trump's lawyers to Mueller in which the lawyers asserted that the president "could, if he wished, terminate the inquiry [into former national security adviser Michael Flynn], or even exercise his power to pardon if he so desired."

It is a worrisome situation. That, however, does not mean it is a situation easily or properly resolved by courts. But many of the president's critics leap to that conclusion, framing their own responses with arguments that the president *can't* lawfully use pardons in these ways and that courts must intervene to stop him. After the Arpaio pardon, law professor Laurence Tribe argued in the *Washington Post* that federal judges should simply nullify the pardon, because "pardoning Arpaio for his willful disobedience of a court order to stop violating Arizonans' constitutional rights" was itself a violation of the Fifth Amendment's right not to be deprived of "life, liberty, or property, without due process of law."

Tribe's argument got no traction in the real world. Parties filed briefs in federal court, arguing that the pardon was unconstitutional, but Judge Susan Bolton, who had herself convicted Arpaio for contempt of court, promptly dismissed Arpaio's criminal prosecution because of the pardon.

More and more, we hear these debates described in terms of 'constitutional crisis.' That term means different things to different people but at its core it reflects public unease with a conflict among government officers or institutions that lacks an obvious mechanism for resolution.

Other critics, who focus on the possibility of Trump's pardoning people being investigated by Mueller, raise other legal arguments against the pardons. The most nuanced and careful version of this argument was advanced by Benjamin Wittes at the prominent *Lawfare* blog. Wittes examined the federal obstruction-of-justice statutes and concluded, "It's not clear to me why a facially valid action taken in the service of managing the Executive Branch, taken with specific intent to commit a crime in order to influence a judicial proceeding, can never violate statutes that endeavor to protect the judicial function." Wittes carefully avoids a categorical conclusion that Trump pardons *would* constitute obstruction of justice. But even his argument that a presidential pardon *could* be criminal is, itself, a controversial proposition.

Others are less nuanced. Jed Shugerman and Ethan Leib, law professors at Fordham, point to the president's constitutional duty to "take Care that the Laws be faithfully executed" and assert categorically, "If the president pardons his associates primarily out of a motivation to protect himself, those pardons would also be invalid as disloyal, and federal courts should probably allow those prosecutions to proceed notwithstanding the pardon."

Shugerman and Leib offer no support for this assertion, other than the inferences that they draw from the "take care" clause, because none exists. It is one thing to argue that the president is duty-bound under the clause not to use his pardon power in service of lawbreaking; it is quite another thing to assert categorically that pardons granted for improper reasons would be null and void and that the courts "probably" would enforce this reading of

the Constitution. Shugerman and Leib, like so many of the president's critics, see a constitutional issue and leap confidently toward a judicial solution.

In that respect, they exemplify an unfortunate habit of too many Americans (and far too many lawyers). But their confidence notwithstanding, arguments over the president's constitutional power to pardon are not susceptible of such easy judicial resolution.

The Constitution's provision committing the pardon power to the president is written with one and only one exception: "The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." There is no exception for self-interested pardons or corrupt pardons. And the fact that the Framers expressly included an exception—for impeachments—shows that they knew how to include exceptions. As the Framers chose not to add another express exception for self-interested pardons or corrupt pardons, their words are best interpreted as intending not to include any implicit limits along those lines.

Moreover, to the extent that the Supreme Court has grappled with the pardon power, it has poured cold water on the suggestion that Congress can pass laws restraining the president's constitutional pardon power. "To the executive alone is intrusted the power of pardon," the Court concluded in *United States* v. *Klein* (1871), "and it is granted without limit."

In *Klein*, the Court was rejecting Congress's efforts to limit the broad use of the pardon power for Confederates, first by President Abraham Lincoln and then by President Andrew Johnson. The Court reiterated its position a century later: "A fair reading of" English and American constitutional history, the Court explained in *Schick* v. *Reed* (1974), "compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress."

So even if Congress had actually intended for the federal obstruction statutes to limit the president's pardon power—which is probably not the best interpretation of those statutes—it lacks the power to impose such limits. At least according to the Court.

And, perhaps more important, according to our Constitution's most famous expositor. In *Federalist* 74, Alexander Hamilton writes that "the benign prerogative of pardoning should be as little as possible fettered or embarrassed." And he emphasizes the Framers' wisdom in subjecting the pardon power to one and only one exception—namely, impeachments, for which the president cannot grant pardons. (Indeed, when Hamilton notes that the only other exception that some had sought to add to the Constitution was one for treason, he further undercuts any argument that courts should step in to nullify pardons that are self-interested or corrupt, or that "obstruct justice.")

Yet the most important part of *Federalist* 74 is not its defense of the broad pardon power. It is Hamilton's justification for entrusting that broad and largely unfettered power to the president. As he explains, the pardon power is entrusted to the president because we can expect the president to temper the criminal laws' categorical prohibitions with case-by-case mercy. "The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel," Hamilton writes. By providing this tool of mercy to a single man, who is in turn accountable to the people at large, the Constitution relies not on judicial management but presidential judgment; not on the president's accountability to judges but his accountability to the people. "The reflection that the fate of a fellow-creature depended on his sole fiat," Hamilton argues, "would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection."

In other words, Hamilton expected that presidents would exercise the pardon power with an eye both to the interests of the criminal and the expectations of the general public. This is an argument not from checks and balances but from presidential character and self-restraint. It reflects Hamilton's earlier argument, in *Federalist* 68, that our Constitution "affords a moral certainty, that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications"—not men with "[t]alents for low intrigue, and the little arts of popularity," but rather "other talents, and a different kind of merit, to establish him in the esteem and confidence of the" people, such that "there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue."

Most important, this argument about presidential character is also, by its own terms, an argument about the *people's* character—or, at least, the character of a coalition of voters sufficient to elect a president.

And that is where the question of President Trump's pardons should (and almost surely will) fall: to the people themselves. If President Trump uses his constitutional prerogative in the service of rewarding political allies or in service of protecting himself by protecting those who might otherwise testify against him, then his conduct will be judged by the voters. Courts are ill-suited to the task of deciding whether President Trump's use of the pardon power is "constitutional" in *legalistic* terms—which are, of course, the only constitutional terms that courts can apply. But the people are necessarily well-suited to the task of deciding whether Trump's use of the pardon power

is "constitutional" in broader terms of ethical and moral value judgments. Indeed, these are constitutional judgments that only the people, in the long run, can decisively adjudicate: through elections and the lessons that history draws from those elections.

This point is especially acute on the question of presidential self-pardon. As Harvard's Jack Goldsmith observed recently at *Lawfare*, "No president has ever tried to self-pardon, constitutional text does not speak overtly to the issue and there is no judicial precedent on point." Despite what confident advocates might assert, "there is no obvious right answer on the validity of self-pardons, and if Trump becomes the first president to pardon himself, a court will probably not provide an answer."

Such skepticism of the possibility of a judicial resolution surely dissatisfies the president's critics but it may also dissatisfy much of the public at large. Whatever one thinks of this president, most neutral observers would be disconcerted by a president's using the pardon power to immunize himself against the law and thus to put himself above the law. So there is a good reason no president has ever attempted it. But that is not to say there is good reason for *courts* to attempt to nullify presidential self-pardons.

Legal scholars and lawyers can conjure legalistic arguments against self-pardon—such as the general notion that "no one may be a judge in his own case," as the Justice Department's Office of Legal Counsel stressed in a cursory 1974 opinion arguing against presidential self-pardon. But that general notion is itself not actual law but a value judgment being grafted on to the Constitution's actual text—and thus it provides little or no basis on which the Court can adjudicate cases while retaining its political legitimacy. Perhaps a single judge would be willing to go beyond the constitutional text and invoke this nontextual principle against the president (either out of conviction or partisanship)—but it seems unlikely, and justifiably so.

The more likely and more appropriate scenario is the one envisioned by *The Federalist*—namely, that the hardest questions of presidential pardoning power will and should be adjudicated, in the end, by the people themselves in subsequent elections. Or, in the meantime, by Congress, through impeachment.

Which leads us to the next part of our complicated constitutional moment.

"If a president pardoned himself," a member of Congress recently observed, "the [House] Judiciary Committee would probably be bound to hold an impeachment inquiry on that and decide what to do based on the testimony that was presented at the inquiry."

These were not the words of a partisan Democrat. They were the words of Rep. Jim Sensenbrenner, a Republican, in June 2018. Sensenbrenner is no stranger to impeachments—in 1999, he helped lead the House Republicans' prosecution in the Senate impeachment trial of President Bill Clinton. And he's not alone. President Trump's friend and adviser Chris Christie agrees. "If the president were to pardon himself, he'll get impeached," the former governor told ABC's George Stephanopoulos in June.

The question of President Trump's pardons should (and almost surely will) fall not to the courts but to the people themselves.

Many Democrats agree, to say the least. And pro-impeachment Democrats are not limiting themselves to just this one argument. From nearly the outset of President Trump's term in office, Democrats in and out of Congress have called for impeachment. In May 2017, just four months into the Trump presidency, Rep. Al Green called for Trump's impeachment: "President Trump has committed an act for which he should be charged by the U.S. House of Representatives," Green announced in a press release. "The act is the obstruction of a lawful investigation of the President's campaign ties to Russian influence in his 2016 Presidential Election."

In December 2017, Rep. Green drafted formal articles of impeachment against Trump, expanding the justification to include everything from the president's executive order limiting entry into the United States by persons from specified nations, to the president's weak response to the Charlottesville white-supremacy riot, to his criticism of former NFL quarterback Colin Kaepernick. (The House voted overwhelmingly to table Green's resolution, 364 to 58.)

Meanwhile, California billionaire Tom Steyer has undertaken a national media campaign demanding that Congress impeach the president. His website—NeedToImpeach.org—lists eight "impeachable offenses" he says Trump has committed, ranging from obstruction of the FBI's investigation of Michael Flynn, to violation of the Constitution's foreign emoluments clause (by making money from foreign officials staying at his hotels), to "conspiring with others" to facilitate Russian interference with our election, to even "undermining freedom of the press."

As with the pardon power, the Constitution's impeachment power is phrased broadly: "The President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The first two terms—"treason" and "bribery"—are

familiar and reasonably specific. But we cannot say the same for "high crimes and misdemeanors." As Cass Sunstein writes in *Impeachment: A Citizen's Guide* (2017), the phrase is "opaque"—it "does not have a self-evident meaning."

Madison's notes from the 1787 constitutional convention recount a brief exchange that offers some guidance, but not much. In September of that year, as the convention came to a close, George Mason invoked Warren Hastings's scandalous misconduct in managing the East India Company, for which Hastings had been arrested and faced an impeachment trial only months earlier. Reminding his fellow delegates that Hastings's transgressions fell short of "treason," Mason objected to the initial version's limit of impeachment to only cases of "treason" and "bribery," which "will not reach many great and dangerous offenses." Instead, he urged the convention to add "maladministration" to the list of impeachable offenses.

Madison objected, warning "so vague a term" would effectively turn the new constitutional system into a parliamentary one, by rendering the presidency "equivalent to a tenure during pleasure of the Senate." Mason withdrew "maladministration" and instead proposed (per Madison's notes) "other high crimes & misdemeanors."

Hamilton added further insight in *Federalist* 65 on the Senate's power to try impeachments. Writing, "The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust," Hamilton argued that they "are of a nature which may with peculiar propriety be denominated political, as they relate chiefly to injuries done immediately to the society itself."

'The framers were sufficiently practical to know that no charter of government could possibly anticipate every future contingency,' Chief Justice Rehnquist wrote, 'and they therefore left considerable room for "play in the joints."'

In his own history of impeachments (written before he presided over President Clinton's), Chief Justice William Rehnquist characterized the Framers' choice of broad constitutional words as committing the issue to the discernment of posterity. "The framers were sufficiently practical to know that no charter of government could possibly anticipate every future contingency," Rehnquist wrote in *Grand Inquests* (1992), "and they therefore left considerable room for 'play in the joints.' Nor did they try to foresee exactly how each of the many powers and checks and balances they conferred and established would work out in particular situations."

Rather, Rehnquist wrote, such questions were "of necessity left to future generations." It played out in the unsuccessful impeachments of Justice Samuel Chase (in 1805) and President Andrew Johnson (1868), the two main subjects of Rehnquist's study, and in the impeachments and intended impeachments of other officers, judges, and even Presidents Nixon and Clinton. (Rehnquist himself did believe that, in Nixon's case, "the counts relating to obstruction of justice and to the unlawful use of executive power were of the kind that would surely have justified removal from office.")

Legal scholars have attempted to translate "high crimes and misdemeanors" into a more precise framework. In *Impeachment: A Handbook* (1974), for example, Yale's Charles Black argued that the constitutional term must not be taken literally to include only actual "crimes," because it would fail to include presidential impropriety that does not violate criminal laws—e.g., a hypothetical president who announces "that he would under no circumstances appoint any Roman Catholic to office," in clear violation of the Constitution's prohibition of religious tests for office. Nor, according to Black, can impeachment be triggered by any and all criminal violations—e.g., it would be "preposterous" to suggest that a president could be impeached for merely "assist[ing] a young White House intern in concealing the latter's possession of three ounces of marijuana," even though the president would have been "guilty of 'obstruction of justice.'" Black argued that impeachment should cover only "serious offenses against the nation or its governmental and political processes, obviously wrong, in themselves, to any person of honor"—or, "those offenses which are rather obviously wrong, whether or not 'criminal,' and which so seriously threaten the order of political society as to make pestilent and dangerous the continuance in power of their perpetrator."

Black's account of the Constitution's impeachment standard may or may not make sense—but it certainly is not "law" in any sense. It is the best approximation of a constitutional scholar.

There are others. Laurence Tribe and Joshua Matz, in *To End a Presidency* (2018), argue that impeachable offenses should "involve corruption, betrayal, or an abuse of power that subverts core tenets of the U.S. governmental system. They require proof of intentional, evil deeds that risk grave injury to the nation," and must be "so plainly wrong by current standards that no reasonable official could honestly

profess surprise at being impeached." Again, this may well be a sensible standard.

But to demand legal precision on this point is, in fact, to demand too much. This was Hamilton's key warning in *Federalist* 65. In explaining why the trial of impeachments was committed to the Senate instead of the Supreme Court, Hamilton stressed that the trial of impeachments would not be a purely legalistic affair—it "can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors, or in the construction of it by the judges, as in common cases [in courts]." And, he further added, "There will be no jury to stand between the judges who are to pronounce the sentence of the law, and the party who is to receive or suffer it," which is to say that the Senate itself must play both roles, reaching decisions that grapple (as judge) with considerations of law, and (as jury) with considerations of justice and mercy. Altogether, Hamilton concludes, the Senate must wield a truly "awful discretion."

It wields that discretion, ultimately, subject to the judgments of the people. This, too, was a point that Hamilton emphasized. Impeachment would be initiated by the House, the people's "immediate representatives." The Senate, like Britain's House of Lords, would "decide upon it."

Hamilton urged that the Senate, unlike the Court, would be capable of "reconciling the people to a decision" at odds with a prosecution brought by their immediate representatives in the House. That is the key point: The legitimacy of an impeachment and trial would ultimately be judged by the people themselves. The people, not judges or congressmen or senators or law professors, are the ones ultimately responsible for concluding what constitutes "high crimes and misdemeanors," as the public eventually judges the actions of the House and Senate.

This does not mean that impeachment does not call for legal judgments or that it is an act of sheer politics. Rather, impeachment does call for legal judgments, but not *legalistic* judgments. It calls for a decision of what "high crimes and misdemeanors" rightly means—a decision made not by lawyers and judges, but by the House and Senate, and then by the people to whom they answer.

But in all likelihood, the House and Senate will not even begin to grapple seriously with these issues until another man concludes his own assigned task.

Of those of all the players on the present constitutional stage, Robert Mueller's directions might seem to be the most straightforward. His authority as special counsel derives exclusively from the Justice Department's regulations providing for the designation of special counsels, set forth in Title 28 of the Code of Federal Regulations. Specifically, Section 600.4, which provides:

> The jurisdiction of a Special Counsel shall be established by the Attorney General. The Special Counsel will be provided with a specific factual statement of the matter to be investigated. The jurisdiction of a Special Counsel shall also include the authority to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses; and to conduct appeals arising out of the matter being investigated and/or prosecuted.

Pursuant to that regulation, acting attorney general Rod Rosenstein defined Mueller's jurisdiction as follows:

> The Special Counsel is authorized to conduct the investigation confirmed by then-FBI Director James B. Comey in testimony before the House Permanent Select Committee on Intelligence on March 20, 2017, including: (i) any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump; and (ii) any matters that arose or may arise directly from the investigation; and (iii) any other matters within the scope of 28 C.F.R. § 600.4(a).

Rosenstein's order to Mueller adds, "If the Special Counsel believes it is necessary and appropriate, the Special Counsel is authorized to prosecute federal crimes arising from the investigation of these matters."

On its face, Rosenstein's order seems much more precise, and thus much simpler to administer, than the constitutional provisions authorizing the president to grant pardons and the House and Senate to conduct impeachment proceedings. But this is illusory. Rosenstein's specification of what Mueller *may* do does not dictate what Mueller must do or should do.

This question of discretion is evident in the explicit authorization for Mueller to bring prosecutions that he believes "necessary and appropriate"—two terms that implicate Mueller's own constitutional, ethical, and prudential judgments. For all the lawyerly ink being spilled over the question of whether a president "can be" subpoenaed to testify or indicted, none of it can point to the answer of whether a president "should be" subpoenaed or indicted—or, to phrase it in terms of Mueller's authorization order, whether it would be "appropriate" for a special counsel to subpoena or indict a president.

In some ways, prosecutors must answer "should" questions all the time. They are not unique to the special counsel order; they inhere in the work of all prosecutors. The prosecutor's job is to enforce laws, but the task itself requires the prosecutor, in choosing how best to enforce the laws, to look beyond the law itself for values to guide his own exercise of the vast discretion afforded to prosecutors.

"Prosecutorial discretion involves carefully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of

the State," the Supreme Court emphasized in a 2014 decision. Or as the Court put it in 1985, a prosecutor exercises discretion from case to case with an eye to "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." These factors "are not readily susceptible to the kind of analysis the courts are competent to undertake." Simply put, all of these are value judgments, not questions of guilt or innocence, legality or illegality.

No one has captured this better than attorney general (and later Supreme Court justice) Robert Jackson, in a 1940 address to an annual meeting of U.S. attorneys, aptly titled *The Federal Prosecutor*. "The prosecutor has more control over life, liberty, and reputation than any other person in America," Jackson observed. "His discretion is tremendous."

The prosecutor can investigate. And, "if he is that kind of person," he can ruin a target's reputation with suggestive public statements. He can pursue the target's friends and associates; he can haul them before secret grand juries, where he can secure indictments with one-sided accounts of the facts. "While the prosecutor at his best is one of the most beneficent forces in our society," Jackson explained, "when he acts from malice or other base motives, he is one of the worst." True, a prosecutor may find some difficulty in winning the conviction and punishment of an innocent man; but there is a lot of ruin that he can bring, short of conviction or indictment.

'We must bear in mind,' the U.S. Court of Appeals for the Seventh Circuit once observed, 'that the United States Attorney is an officer of the executive branch responsible primarily to the President, and, through him, to the electorate.'

Precisely because of "this immense power to strike at citizens . . . with all the force of government itself," Jackson continued, the office of U.S. attorney "from the very beginning has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States." And though a U.S. attorney is afforded great leeway in directing the work of his office in his given federal district, there are limits to the amount of discretion that can rightly be vested in his office. "Experience," Jackson explained, "has demonstrated that some measure of centralized control is necessary." The attorney general did not say aloud what that "centralized control" was, but he didn't need to. He was referring to the Justice Department's Washington headquarters, operated under control of the attorney general himself, accountable to the president—who is in turn accountable to the people. "We must bear in mind," the U.S. Court of Appeals for the Seventh Circuit once observed, "that the United States Attorney is an officer of the executive branch responsible primarily to the President, and, through him, to the electorate."

As a matter of constitutional first principles, the federal prosecutor's ultimate accountability to the president reflects the Constitution's imposition of a duty on the president to "take care that the laws be faithfully executed," and his constitutional oath to "faithfully execute the Office of President of the United States." It also reflects what Hamilton identified in *Federalist* 70 as the need for "unity" in the executive branch, which would facilitate the executive's "energy," which was itself "essential to the steady administration of the laws" and thus "a leading character in the definition of good government." And in the end, Hamilton famously wrote, the executive branch's "unity" ensured its "responsibility"—that is, the president's ultimate and singular accountability to the people as a whole.

For Mueller, however, there is at least some relaxation of the prosecutor's accountability to the president. Indeed, that is the whole point. As the Clinton Justice Department explained in the *Federal Register* announcing a new framework in July 1999, the special counsel's office reflects "a balance between independence and accountability in certain sensitive investigations," such that the special counsel enjoys "day-to-day independence" from the attorney general and president, "free to structure the investigation as he or she wishes and to exercise independent prosecutorial discretion to decide whether charges should be brought," subject only to the Justice Department's generally applicable standards and procedures. The attorney general nonetheless retains "ultimate responsibility," and thus there remains the "possibility of review of [the special counsel's] specific decisions" by the attorney general.

These measures of independence fall short of the now-expired independent counsel statute that governed the controversial investigations of the 1980s and 1990s (including Ken Starr's Whitewater investigation, culminating in President Clinton's impeachment) and that passed constitutional muster with the Supreme Court in *Morrison* v. *Olson* (1988). Indeed, there are open questions about how "binding" these regulations actually are: Because they were rules applying to agency organization and personnel, they were exempt from the usual notice-and-comment procedural

requirements and thus can be rescinded without an opportunity for public comment just as they were promulgated without it. And because they are merely an agency's own rules, not a law passed by Congress, there is an open question of whether they can bind the president at all.

But no matter how thorough the special counsel's independence is, the regulations creating a stand-alone office of special counsel for case-specific prosecutions inherently relax at least some of the institutional forces that circumscribe a prosecutor's exercise of discretion. For example: Because the special counsel is focused on a narrow set of cases, not a broad and active docket of different cases competing for fiscal and personnel resources, he can approach his narrow set of targets with a significantly different mindset. Justice Scalia highlighted this in his famous *Morrison* dissent:

> The mini-Executive that is the independent counsel, however, operating in an area where so little is law and so much is discretion, is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide. What would normally be regarded as a technical violation (there are no rules defining such things), may in his or her small world assume the proportions of an indictable offense. What would normally be regarded as an investigation that has reached the level of pursuing such picayune matters that it should be concluded, may to him or her be an investigation that ought to go on for another year. How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile—with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities.

And so when special counsel Mueller faces the prudential choices that any prosecutor must make—including decisions of whether a particular indictment is "necessary and appropriate," he and his office will make those decisions without the institutional influences and presidential accountability that normally surround and oversee a prosecution. Again, that's the point, and the benefits of this independence in cases implicating the executive branch itself are freely conceded. But we must not forget that those benefits come at a cost.

These choices will be made, in the first instance, according to Mueller's own legal, ethical, and prudential judgments. And while those cheering him on often assume that Mueller can and will press those powers to the greatest possible extent, there is reason to think or hope that he will restrain himself and thus embody the same qualities of character that Hamilton ascribed to the executive in *Federalist* 68.

For example, many of President Trump's critics argue that Mueller can subpoena the president to testify, or even indict the president. There is great reason to doubt such assertions: Stuart Taylor and I outlined the possible constitutional limits on Mueller's subpoena power in these pages ("Privilege and Precedent," May 11, 2018); the Justice Department's Office of Legal Counsel outlined the possible constitutional limits on the indictment power in a 2000 opinion memorandum.

But more immediately, there is reason to expect Mueller himself to stop short of testing those constitutional limits. First of all, there is "litigation risk." But second, and more important, he might simply restrain himself from fully asserting his powers against the president, except where strictly necessary.

Lawrence Walsh, independent counsel for the Iran-Contra investigation, suggested such measures of self-restraint in a 1998 hearing of the House Judiciary Committee. "[W]hat restraint should be expected of a prosecutor investigating the president of the United States?" he asked. "Should a president be subjected to the same tactics as a racketeer or a corrupt municipal official?" Walsh, though hardly known for self-restraint, conceded the need for prudence. "In the national interest, the president should probably be entitled to greater protection from longshot efforts to prove a minor crime," he explained. "Should a president, carrying out the most demanding and important job in the world, have to guard himself against such tactics"—namely, "sting" operations and "cooperating informer[s]"—"when dealing with his confidants—or with his friends?"

Perhaps Mueller is grappling with these questions himself. While Trump opponents around the country seem keen to condemn every new move by the president as another indictable "obstruction of justice," will Mueller—the man singly responsible for the investigation and eventual prosecutions—be similarly eager to press his powers to the fullest?

No matter what Mueller ultimately decides, we too may have to grapple with these questions. If Mueller attempts to prosecute the president (perhaps leading to an attempted self-pardon), or if Mueller delivers to Congress a report that spurs the House to begin impeachment proceedings, the ultimate judgments will be delivered by the American people through the elections that keep the president and members in Congress or cast them out of office.

These issues of constitutional structure and power, like those of pardon and impeachment, will ultimately be adjudicated by the people themselves, within the constitution's structure and powers. That is our true constitutional moment.

"We rightly think of our courts as the final voice in the interpretation of our Constitution," Chief Justice Rehnquist observed in the closing lines of *Grand Inquests*, "and therefore tend to think of constitutional law in terms of cases decided by the courts."

But the actual history of impeachments, he wrote, especially those of Justice Chase and President Johnson, should teach us otherwise: "These two 'cases'—decided not by the courts but by the United States Senate—surely contributed as much to the maintenance of our tripartite federal system of government as any case decided by any court."

Rehnquist was right to focus our attention beyond the courts. But we should look further still—beyond the Senate, to the American people who received the Senate's decisions in those cases and ratified them.

If the American people had loudly rejected the Senate's choices in the Chase and Johnson impeachments, by punishing the senators in subsequent elections and pressing their replacements to continue the attacks on Federalist judges (in Chase's time) or to continue the attacks on President Johnson and other impediments to the Radical Republicans' Reconstruction, history would have drawn very different lessons from the two impeachments.

Instead, after Justice Chase's failed impeachment, the public did not punish the moderate Republicans, and the lack of appetite to use impeachment as a tool to punish Federalist judges soon became evident, as Richard K. Neumann Jr. found in his 2007 study of impeachments. And this effectively settled the constitutional question; in an 1822 letter, Jefferson would complain that life-appointed judges were "responsible to no authority . . . for impeachment is not even a scarecrow."

Rehnquist emphasizes the point. "The importance of these acquittals," he wrote, "can hardly be overstated." They firmly established that "[i]mpeachment would not be a referendum on the public official's performance in office," but a more focused and formal inquiry. And for the Senate to remove an impeached judge or president would require not just "any technical violation of the law," but something much more significant.

Chase's impeachment trial had further, subtler constitutional ramifications. As Neumann explains, Federalist judges recalibrated their own judicial behavior after surviving the Chase impeachment's near-death experience (because Chase, if removed from office, would not have been the last of them to go). "Although the judiciary remained vaguely Federalist in its outlook, it abandoned much of the partisan behavior that so incited the Jeffersonians."

Neumann then helpfully compares this to a more recent episode: "The Chase impeachment, though unsuccessful, may have had an effect on the federal judiciary similar to the one that the 1936 election and Franklin D. Roosevelt's court-packing proposal may have had on the Supreme Court." Which is to say, FDR's court-packing plan, after being overwhelmingly rebuffed by voters in 1936, was a moment that in hindsight entrenched a constitutional norm against partisan gamesmanship with the Court's own structure.

We can think of other modern examples in the same vein. The Supreme Court declared the independent counsel statute constitutional in *Morrison* v. *Olson*, over Scalia's vocal dissent, but the subsequent experience of independent counsel investigations, culminating with the failed impeachment of President Clinton, seemed to deliver a much more consequential political verdict against the independent counsel. So Congress allowed the statute to expire. The Independent Counsel Act may have been declared "constitutional" by the Supreme Court, but its imprimatur seems much less credible today. Congress, with the assent of the people, effectively sided with Scalia's dissent.

In the Federalist Papers, we find the crucial but overlooked key to preserving a genuinely republican Constitution: namely, an acceptance that in some constitutional disputes, the best meaning of constitutional text will be found not in the lawyerly forensics of Supreme Court arguments alone but through the lived experience of politics.

We do not often think of political showdowns in terms of constitutional "precedents"; we tend to focus on constitutional questions that are "settled" by the Supreme Court. Perhaps we think we lack a vocabulary or framework for this sort of resolution. But this is a mistake. We need to think of these things in the way that James Madison did in *Federalist* 37, that of "liquidation."

Madison, writing of the then-proposed Constitution's vague, ambiguous, and otherwise unclear terms, warned that there is only so much precision to be attained in any written law—at some point, we must rely on lived experience to clarify the rest. "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal," Madison explained, "until their meaning be liquidated and ascertained by a series of particular *discussions and adjudications*."

Here we find the crucial but overlooked key to preserving a genuinely republican Constitution: namely, an acceptance that in some constitutional disputes, the best meaning

of constitutional text will be found not in the lawyerly forensics of Supreme Court arguments alone but through the lived experience of politics. We ascertain the best meaning of some constitutional terms through the constitutional processes themselves. And this is a process that ultimately is resolved by the voters, as illustrated in Larry Kramer's seminal and suitably titled work *The People Themselves* (2004), as well as by University of Chicago professor Will Baude in a major forthcoming law review article.

Another significant legal scholar, Yale's Bruce Ackerman, dedicated multiple volumes of study, in *We The People*, to what he called "constitutional moments." Ackerman carried the theory too far, arguing that the political settlement of a constitutional dispute, through public debate rising above the usual partisan fray and focusing deliberately on higher constitutional principle, should be accepted as a de facto "amendment" to the Constitution. But the term Ackerman coined—"constitutional moment"—is apt.

It captures well the moment in which political events settle disputed constitutional territory, liquidating ambiguous terms. Including, perhaps, such terms as "high crimes and misdemeanors," and such questions as whether the president's power "to grant reprieves and pardons for offences against the United States" is best understood as incorporating principles of justice that stop short of self-pardon; or whether "the executive power" and the obligation to "take care that the laws be faithfully executed," both committed to the president, should serve to limit prosecution of the president himself. These are all questions that political actors—Congress, the president, and special counsel Mueller—will answer in the first instance but that we the people, in our own debates and subsequent elections, will settle in the end.

The problem with the settlement of constitutional moments, however, is that we do not know precisely when the moment has started, or when it has ended, or what the actual settlement was, until much later. Those are distinctions that history draws in retrospect. If Mueller tries to subpoena the president's testimony or even prosecute him, or if the president pardons himself, or if the House impeaches the president and the Senate adjudicates it, then history will draw lessons of constitutional import from the political resolution that follows, just as it has done from past impeachments, and court-packing plans, and other constitutional moments. But only in time.

For us the challenge is not to treat these issues as matters left to courts alone but to engage these deliberations as genuine constitutional decision-makers—which we may turn out to be in hindsight, once the constitutional moment has passed. ♦

Ilya Repin's painting Barge Haulers on the Volga *(1870-73) became for the Russian populists an iconic depiction of the people's suffering.*

Pig and People

The rise and fall of the first Russian populists.

BY GARY SAUL MORSON

Americans trace the term "populism" to the 1890s, but Russian "populism" (*narodnichestvo*, from *narod*, the people) began in the 1870s. The "*narodniks*" dominated Russian thought for two decades, and their successors, the Socialist Revolutionaries, became the country's most influential political party until the Bolshevik coup. The importance of Russian populism lies less in its programs than in its ethos, a guilty idealism that can teach us a lot today—not only about populism itself but also about the clash of any idealism with recalcitrant reality.

Russia's greatest writers, painters, and composers all reflected on, if they did not participate in, what one historian called "the agony of populist art." "Agony" is the right word to describe a movement whose greatest artists drank themselves to death, committed suicide, or went insane. Russians' natural extremism makes the problems inherent in all idealistic movements especially visible.

Jolting from one panacea for evil to another, Russian intellectuals at last arrived at worship of "the people," a term usually meaning the peasants, who constituted the overwhelming majority of the population. Today, the word "populist" is often used as a term of abuse disparaging boorish, mindless followers of a demagogue, but "narodnik," though originally pejorative, was soon adopted by the populists themselves to indicate their reverence for the Russian people's innate wisdom. To argue for a policy it was common not to demonstrate its effectiveness but to show that it was supported by "the people," as if the people could not be wrong. In *Anna Karenina*, everyone is shocked when Levin, Tolstoy's hero, rejects this whole way of thinking. "That word 'people,'" he says, "is so vague."

Any ideal worth adopting had to explain the meaning of life. In one of his best stories, "On the Road," Chekhov reflected on such idealism by telling the story of Grigory Likharev, who finds himself snowed in at an inn on Christmas Eve. There he encounters a noblewoman, Madame Ilovaiskaya, on her way to her father and brother, who without her wouldn't take basic care of themselves. She listens with rapt

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attention to the charismatic Likharev's account of his lifelong embrace of one set of beliefs after another.

Likharev always lives "on the road," journeying from place to place to preach idea after idea. Some people, he explains, possess a talent for faith, a special faculty of the spirit that compels them to believe totally in one thing or another. "This faculty is present in Russians in its highest degree. Russian life presents us with an uninterrupted succession of convictions and aspirations and, if you care to know, it has not yet the faintest notion of lack of faith or skepticism. If a Russian does not believe in God, it means he believes in something else."

There has never been an hour, Likharev explains, when he did not believe in something. When his mother told him, "Eat! Soup is the great thing in life!" he ate soup 10 times a day "till I was disgusted and stupefied." When his nurse scared him with stories about goblins, he left poisoned cakes for them. To achieve Christian martyrdom he hired other boys to torture him. Whatever the faith, he always inspired someone else to join him.

At the university, he "gave [himself] up to science, heart and soul, passionately, as to the woman one loves." He went around preaching the truth that white light really consists of seven colors, and "glowed with hatred for anyone who saw in white light nothing but white light." He made an ideal of nihilism and accepted materialism for spiritual reasons. At last he arrived at populism, which fit his personality perfectly.

The populists preached "going to the people," abandoning corrupt cities to live among the peasants in order to educate them and absorb their inarticulate wisdom. "I 'went to the people,' worked in factories, worked as an oiler, as a barge hauler," Likharev explains. "I loved the Russian people with poignant intensity; I loved their God and believed in Him, and in their language, their creative genius. … My enthusiasm was endless!"

Likharev worked as a "barge hauler" because that horrible occupation became the populist symbol of the people's suffering. The most famous painting of the 19th century, Ilya Repin's heartrending *Barge Haulers on the Volga* (1870-73), depicts a group of men harnessed together to haul riverboats. In a widely read article on contemporary Russian painting, "Apropos of the Exhibition," Dostoyevsky explains that he anticipated a depiction of barge haulers wearing ideological "uniforms" with "the usual labels stuck to their foreheads," but to his delight found nothing of the kind. To be sure, he opined, rags like the ones these workers wear would immediately fall off, and one of the shirts "must have accidentally fallen into a bowl where meat was being chopped for cutlets." But the people are real. Two are almost laughing, a little soldier is concealing his attempt to fill his pipe, and none is thinking about oppression. You love these defenseless creatures, Dostoyevsky explains, and can't help thinking that you are indeed indebted to "the people."

Populism fed on guilt, and everything about Likharev, down to his very gestures, expressed a consciousness of guilt about something. The populist ideologists insisted that all high culture depends on wealth stolen from the common people and is therefore tainted by a sort of original sin. As Russia's greatest autobiographer Alexander Herzen lamented, "All our education, our literary and scientific development, our love of beauty, our occupations, presuppose an environment constantly swept and tended by *others* … *somebody's* labor is essential in order to provide us with the leisure necessary for our mental development." Shame and guilt over unearned privilege shaped a generation of the "repentant nobleman." Pyotr Lavrov's *Historical Letters* (1868-69), the populist bible, put it this way: "Mankind has paid dearly so that a few thinkers sitting in their studies could discuss its progress."

Perhaps high culture should be abolished altogether? This urgent question came to be called "the justification of culture," with many writers contending that justification was impossible. Since the symbol of Russian culture was Pushkin, critics, most notably the nihilist Dmitri Pisarev, insisted that any pair of boots is worth more than all of Pushkin's verse. The nihilists at least worshiped science—like Bazarov in Turgenev's *Fathers and Sons*, who dissects a frog to show that people are nothing but complex amphibians—but the populists rejected science as well. A story about the writer Vsevolod Garshin as a boy tells how he too dissected a frog, only to take pity on it, sew it up, and let it go. Not knowledge but pity became the moral touchstone. The populist argument about "the justification of culture" became part of what philosopher Nikolai Berdyaev called "the Russian Idea" and, so far as I know, marks Russian culture as unique. (To be sure, it is common today to convict the Western tradition as the product of imperialism and dead white males, but that is still different from rejecting high culture per se.)

If populism fit Likharev's guilty conscience so well, why did he give it up? Out of guilt, of course. Having run through his fortune and his wife's, and impoverished their children, he grasped a truth dear to skeptical Chekhov's heart. Ideologies of all sorts undervalue real people of the present moment and, in pursuit of some superhuman goals, neglect the everyday processes that truly make a life good or bad. "I have lived," Likharev explains, "but in my fever I have not even been conscious of the process of life itself. Would you believe it, I don't remember a single spring, I never noticed how my wife loved me, how my children were born. … I have been a misfortune to all who have loved me. … I cannot even boast, Madam, that I have no one's life upon my conscience, for my wife died before my eyes, worn out by my reckless activity."

On the verge of recognizing the harm that ideology does, Likharev converts this insight into yet another ideology. Moved by his wife's death, he, like other Russian idealists, switches from worshiping peasants to worshiping women and their amazing capacity to sacrifice themselves. More than once, he explains, women have followed his enthusiasms "without criticism, without question, and done anything I chose: I have turned a nun into a nihilist, who, as I heard afterwards, shot a

gendarme." What matters is not what women sacrifice themselves for, but their "wonderful mercifulness, forgiveness of everything. … The meaning of life lies in just that unrepining martyrdom." Russians came to idolize prostitutes and women terrorists as paragons of virtue.

Likharev's speech mesmerizes Madame Ilovaiskaya. Ever unappreciated, she is amazed that women like herself are his new enthusiasm "or, as he said himself, his new faith!" She is ready to follow him. "With his gesticulations, with his flashing eyes, he seemed to her mad, frantic, but there was a feeling of such beauty in the fire of his eyes, in his words, in all the movements of his huge body, that without noticing what she was doing she stood facing him as though rooted to the spot, and gazed into his face with delight." He sees this, but leaves without her, and the story ends with his coach disappearing into the storm while "his eyes kept seeking something in the clouds of snow." Chekhov saw the populist mentality as emblematic of all Russian idealisms—disdainful of everyday experience and, however harmful, immune to any disconfirmation.

Gleb Uspensky (painted by Nikolai Yaroshenko in 1884) feared the populist project was futile.

Populism's two best writers both resembled Likharev. Gleb Uspensky (1843-1902) belonged to the movement heart and soul, while Vsevolod Garshin (1855-1888), whom Chekhov especially admired, remained on its outskirts. Known as a "Hamlet of the heart," unable to commit himself unreservedly to anything, Garshin could describe the populist ethos sympathetically from within and skeptically from without in the same stories.

Uspensky's personality was made for the populist ethos. From childhood he suffered from paralyzing guilt. If anxiety is fear seeking an object, we lack a word for guilt seeking something to repent for. Even as a child, Uspensky recalled, "I was guilty before the saints, the images, the chandeliers." One of his heroes claims his generation lives "in the conscience-stricken epoch of Russian life. … It was time for society to remember that there is something called conscience." And it must do so with single-minded urgency: "Right away, at this very minute, one had to work, serve in this giant infirmary and by every means help in bringing health, in curing the sick, the cripples, the monsters."

The heroes of Uspensky's sketches, who keenly sense their "swinishness," seem to care more about easing their souls than helping the people. Such idealism, as Dostoyevsky noted, is really a form of selfishness. The oppressed exist to be saved. Anyone who thinks this way is "An Incurable," the title of one Uspensky story in which a deacon begs a doctor who has treated his bodily pains for something to cure his soul. The deacon has encountered a wealthy populist woman who has sacrificed everything to "go to the people," an act of selflessness that makes the deacon's life meaningless by comparison. The deacon's spiritual torment, we learn, leads him not to a better life but to abandon his family for drink.

These sketches record Uspensky's own experience of repeated disappointment. For the populists, the peasant was not just natural man but, even better, natural Russian man, unsurpassed in virtue. Unlike their foreign counterparts, Russian peasants still lived in communes, where people thought more of the group than of themselves. That was the theory, but Uspensky found reality more and more at odds with ideology. Most of his sketches describe an intellectual like himself who first discovers that the peasants are utterly corrupt and then tries to preserve his faith in them with one rationalization or another, as Uspensky himself did.

In one sketch, the narrator realizes that what the peasants most admire is success in pursuit of money. A village hero, Mikhail Petrovich, has accumulated capital by first selling his wife to travelers and then cheating an officer out of his property. Far from disapproving, the peasants elect him their elder, a position he uses to embezzle communal funds, which only makes the peasants he robs admire him even more. "The whole village knew that his wife was consorting with the devil, but the very ability, the knowledge of how to go about it, how to turn things to one's own advantage—this conquered everyone."

In another sketch, the narrator discovers that the commune is perfectly willing to let a widow and her child starve. When a neighboring landlord offers to sell the commune land on advantageous terms, the peasants cannot agree because each justly suspects the others of cheating. They brutally beat one of their members to death. Uspensky had once attributed peasant lapses to poverty, but came in time to recognize that the problem was not economic but moral. The populists in Petersburg accused Uspensky of blasphemy.

Uspensky did everything he could to justify the people. In his sketches about the peasant Ivan Ermolaevich, who professes complete selfishness in his pursuit of money, the narrator, at first appalled by his cruelty, eventually decides that Ivan Ermolaevich must be regarded as an artist devoted to his craft. He is, in any case, following "the course of life that is predetermined"

for him. "No, he is not guilty. I, the educated Russian, I am most decidedly guilty." As the historian Richard Wortman observes: "Unable to reconcile the real with the ideal, he idealized reality."

Uspensky gradually lost his grip on reality. "'The eternal life' of the countryside has … aggravated and undone my nerves," he remarked. Haunted by hallucinations, he spent his last years in an asylum. With unrelieved guilt for his "swinishness," Uspensky came to believe he really was a pig and tried to turn his face into a snout.

Garshin, too, experienced mental breakdowns, moved in and out of asylums, and eventually committed suicide by throwing himself down the stairs. When war broke out with Turkey, he, like a number of others, joined the Russian Army as a private in order to be "with the people." His story about that experience, "Reminiscences of Private Ivanov," impressed readers as subtle, understated, and untendentious. If Uspensky's overriding emotion was guilt, Garshin's was extreme sensitivity to others' pain. "This martyr of the spirit," one contemporary maintained, "suffered from an illness from which it is morally wrong to recover." His pathological empathy led him to see actual human experience as repulsive, and one of his trademarks was realist descriptions evoking sheer disgust.

His first famous story, "Four Days," describes a Russian soldier who, like Garshin himself, enlisted without considering he might hurt someone. "The idea that I too would kill people somehow escaped me. I only saw *myself* as exposing *my* breast to the bullets." In the confusion of battle, the hero bayonets a Turk and then, severely wounded, is left for dead next to the Turk's corpse. He spends four days witnessing and smelling the decomposition of the Turk's body, which he describes in excruciating detail. "Once when I opened my eyes to look at him, I was appalled. His face was gone. It had slid off the bones," one such description begins. Usually read as an antiwar tale, "Four Days" may also be taken as a story about the nauseating human condition and the ultimate fate of us all.

Garshin befriended the Russian painters called "Itinerants," who favored scenes of Russian life, including pictures of suffering like Repin's *Barge Haulers*. Like so many others, Repin was struck by Garshin's distinctive personal beauty—some said he could be a model for the Savior—and, in his famous painting of Tsar Ivan the Terrible right after he has murdered his son in a rage, Repin gave the dead tsarevich Garshin's face. His portrait of Garshin shows a man afflicted with a deep, almost metaphysical sadness, at his writing desk. Garshin wrote one of his finest stories about the Itinerants.

Vsevolod Garshin (painted by Ilya Repin in 1884) wrote with deep compassion and without sentimentality.

"Artists" traces the thoughts of two painters with opposite ideas about art. The kindly Dedov views art's goal as beauty that moves "a man's soul to a mood of gentle tranquil wistfulness." His friend Ryabinin, a populist based on the Itinerants, chooses to paint a worker whose job is to press his chest against a rivet on the inside of a boiler while another workman hammers it. These human anvils represent all the suffering that people inflict on each other. Dedov disparages such work as "looking for the poetic in the mud! … All this peasant trend in art, in my opinion, is sheer ugliness. Who wants those notorious 'Volga Bargemen' of Repin's?" Ryabinin, by contrast, paints a canvas supposed to shout to wealthy viewers: "I am a festering sore! Smite their hearts, give them no sleep. … Kill their peace of mind, as thou hast killed mine."

The closer Ryabinin's painting comes to completion, the more it drains him of health until at last he gives up painting to become a teacher for peasants. As the story closes, the narrator tells us that Ryabinin failed at that profession as well. For all our sympathy for Ryabinin, we wonder whether empathy taken too far does more harm than good. Could it even be a form of self-indulgence?

Some Garshin stories describe a prostitute, Nadezhda Nikolaevna, whom one hero regards the way Chekhov's Likharev might: as a martyr taking on all human suffering. "An Incident" deals with a man who regards her as a superior being and wants to rescue her. Psychology defeats the dream. A truly Dostoyevskian figure, Nadezhda would rather hold on to her resentment than join the world that looks down on her. You cannot save someone like that, and the hero commits suicide. In "Nadezhda Nikolaevna," she becomes the model for an artist's painting of Charlotte Corday, "the fanatic champion of good," who murdered Marat out of high principle. The painting asks whether violence is ever morally permitted, even to save sufferers like Nadezhda herself. As it happens, another painter wants to depict a legend about how Russia's great folk hero Ilya Muromets reads the New Testament and discovers that all his glorious military deeds violate Christ's commands. *Am I supposed to let evil happen without resisting it?* Ilya asks. "Leave them to plunder and kill? Nay, Lord I cannot obey Thee. … I understand not Thy wisdom; Thou hast given my soul a voice, and I listen to that and not to Thee!" The story's two paintings pose

the same question about violence in pursuit of justice. Together, they suggest that art's goal is to pose, not answer, great questions. As the second painter explains, "You make people think, that's all. … Is it not that which gives meaning to what you are doing?" All Garshin's stories end with questions.

Garshin's two best-known tales take the form of parables about idealism. In "Attalea Princeps"—the title is the scientific name of a Brazilian tree—a tree in a greenhouse yearns for freedom. Directing all her energies to growing taller, she plans to break the greenhouse glass and experience the world outside. Eventually she succeeds, but this is Russia and so the Brazilian tree realizes she will die. "Is this all?" she asks herself. "Is this all I languished and suffered for so much?" Ideals fail not only when unattainable but, still worse, when attained, as every revolution shows.

Drawing on Garshin's own sad experience, "The Scarlet Flower" depicts an idealist in an asylum who knows he is mad and yet believes his insane reasoning. He imagines that he is called upon "to fulfill a task which he vaguely envisaged as a gigantic enterprise aimed at destroying the evil in the world." All evil, he decides, proceeds from three red flowers growing in the prison yard. One by one, he contrives to pick them, each time holding it to his breast all night to defeat its evil by absorbing it into himself. He wakes up weaker and thinner. Having picked the third flower, he dies convinced that he has rid the world of evil. By morning "his face was calm and serene; the emaciated features … expressed a kind of proud elation. … They tried to unclench his hand to take the crimson flower out. But his hand had stiffened in death, and he carried his trophy away with him to the grave." Garshin knew that his own utopianism was futile at best.

Chekhov's story "A Nervous Breakdown" appeared in a volume dedicated to the memory of Garshin. Like Garshin, its hero, a talented law student named Vasilev,

Nikolai Yaroshenko's The Stoker *(1878), now at the Tretyakov in Moscow, was partial inspiration for the human anvils of Garshin's story 'Artists.'*

> had a peculiar talent. A talent for *humanity*. He possessed an extraordinarily fine delicate sense for pain in general. As a good actor reflects in himself the movements and voice of others, so Vasilev could reflect in his soul the sufferings of others. … If he saw an act of violence, he felt as though he himself were the victim of it. … The pain of others worked on his nerves, excited him, roused him to a state of frenzy.

Vasilev reluctantly accompanies two friends, an artist and a medical student, on a sort of pub crawl from one bordello to another, sampling the awful music, inspecting the intentionally ugly decoration, and talking with the prostitutes. Vasilev has always accepted a sentimental picture of prostitutes as "acknowledg[ing] their sin and hop[ing] for salvation." Like a populist going to the people, he finds they do nothing of the sort. He discovers no "guilty smile," as he expected, but finds "on every face nothing but a blank expression of everyday vulgar boredom and complacency." Tormented by the thought that he "hated these women and felt nothing but repulsion toward them," he blames himself for seeing them only as animals, as not human.

But he soon sees them as still more repellent: The women do not just lack humanity, they display a sort of inverse humanity, exhibiting the opposite of the best human qualities. "Everything that is called human dignity, personal rights, the Divine image and semblance, were defiled to their very foundations." Vasilev demands that his friends justify the existence of high culture, of their medicine and art, in the face of such dehumanization. Pointing to Vasilev's own expression of hatred and repulsion, the artist replies that "there's more vice in your expression than in the whole street!" Can too much concern make the world worse?

Vasilev descends into near madness: Terror grips him until a sense of repulsion from everything, even noble deeds, leaves him utterly incapacitated. Fortunately, Vasilev's friends return, he begs them to save him from suicide, and they tend him until the mood passes. Was it only chance that no one saved Garshin? Or is the idealist spiritual condition destined for catastrophe?

The populists' efforts to "go to the people" failed utterly. Far from embracing their revolutionary ideology, the peasants turned their worshipers in to the police. In despair, many populists—but not Garshin or Uspensky—established the Russian terrorist movement. If Russian history demonstrates anything, it is that nothing causes more evil than the attempt to abolish it altogether. The scarlet flower blooms in the Gulag.

To this day the idea persists that the Russian people, especially the simple rural ones, somehow carry the moral solution to all the world's ills. Under what Dostoyevsky called their "alluvial barbarism" lies the purest spirituality. For Russians, faith in the people's virtue is equaled only by another belief: in the moral glory of Russian literature. That belief is warranted. ♦

B&A

Bodies of Work

The case for warts-and-all biographies.

BY AMY HENDERSON

Victorians Undone
Tales of the Flesh in the Age of Decorum
by Kathryn Hughes
Johns Hopkins, 414 pp., $29.95

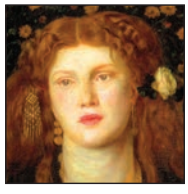
Kathryn Hughes has written a veritable freak show of a book. She fluidly and graphically describes iconic Victorian figures by focusing not on their accomplishments but on various body parts that had some effect on their lives.

A professor at the University of East Anglia, Hughes explains that the genre of "biography"—etymologically "life writing"—tends to conceal or deny the importance of the embodied aspects of life. Victorian biographers in particular, she contends, wrote "as if their subjects … had never possessed such a thing" as a body. Lytton Strachey's *Eminent Victorians* (1918) was in part a reaction against this tendency; he gleefully exposed not only the moral and psychological but also the physical imperfections of his subjects. He wrote, for example, of the saintly Florence Nightingale's "peevish" mouth and fat, cushiony old age. Hughes seeks to restore that kind of "lumpiness" to biography; she thinks readers will want to know of the subjects of biographies

> How did it feel to catch sight of them across a crowded room, or to find yourself sitting next to them at dinner? … Did they smell (probably, most people did)—but of what exactly? Were they natty or slobbish, a lip-licker or a nose-picker?

Victorians Undone is an experiment aimed at putting "mouths, bellies and beards back into the nineteenth century."

Hughes begins with the plight of one of Queen Victoria's ladies-in-waiting. Court politics were vicious early in Victoria's reign, and Lady Flora Hastings became the target of surpassing nastiness. In 1839 she grew deathly ill; Hughes writes that she was "thin as a skeleton," her "once-elegant neck, now stretched like twisted rope," her scalp "a rucked patchwork of bristle and skin." Most noticeable, though, was her belly, which thrust "obscenely from her sparrow frame." Was unmarried Lady Flora pregnant? The teenaged Victoria delighted in "sizing up women's bodies for evidence of their sexual lives" and furthered the rumor that Lady Flora was in a scandalous condition. She was subjected to grossly ignorant gynecological examinations—and ultimately died not because she was pregnant but because of a painful liver disease. The incident, Hughes writes, "stripped bare the *realpolitik* of women's sexual lives at court," where no one—not even Victoria—was spared: "Her reign would not be secure until her body had done what queens' bodies are supposed to, which is produce a male heir."



Fanny Cornforth and her luscious lips

Hughes turns next to Charles Darwin. The scientist suffered from painful facial eczema and so he happily embraced the post-Crimean War mania for facial hair. Darwin's long, bushy beard became iconic thanks to photographers like Julia Margaret Cameron and cartoonists who drew his extravagantly furry face atop simian bodies in mockery of his theory of evolution. Men assumed that bristling whiskers conveyed manliness, Hughes argues, while women were disgusted by beards' uncleanliness. By the 1870s, a younger generation of men scuttled the beard fad.

Hughes, who previously wrote a biography of George Eliot, here dedicates a chapter to the great novelist. Eliot was sensitive about her homely appearance—of which Henry James famously said, "in this vast ugliness resides a most powerful beauty which, in a very few minutes, steals forth and charms the mind so you end, as I ended, in falling in love with her." Hughes puts to rest the rumor that years of churning butter had made Eliot's right hand larger than her left; Hughes examines one of Eliot's right-hand gloves and finds it a size 6½—"the nearest thing to a nymph's."

Hughes uses the scandal surrounding Dante Gabriel Rossetti's painting of his lover Fanny Cornforth—emphasizing her voluptuous, kissable lips—to explain how working-class women in the 1840s and '50s resorted to "sly prostitution" to earn extra money. Hughes believes that Cornforth "behaved exactly as any of us might if we had grown up without any expectation that the world would feed us for free." A different Fanny—an 8-year-old murder victim named Fanny Adams—is the focus of Hughes's last chapter. She describes in grisly detail how the girl's dismembered body was discovered, piece by piece.

Hughes's expertise in the Victorian era makes her the perfect pathfinder for a new style of "life writing," and her warts-and-all approach to forensic biography adds another dimension to our understanding of the past. The mix of flesh and decorum, propriety and prurience is highly readable. But her graphic bodily revelations—lurid and sometimes macabre and bloody—will not be everyone's cup of tea. In the hands of a lesser scholar, this subject could become outright pornographic; as it is, *Victorians Undone* feels sensationalistic and somewhat voyeuristic—meaning that it is certainly in keeping with our own times. ♦

Amy Henderson is historian emerita of the National Portrait Gallery.

B&A

No Dress Rehearsal

Farewell to the Tragically Hip, rockers who helped Canada see itself anew. **BY MICHAEL TAUBE**

The Never-Ending Present
The Story of Gord Downie and the Tragically Hip
by Michael Barclay
ECW, 482 pp., $27.95

Gord Downie's announcement in May 2016 that he had been diagnosed with a terminal brain tumor shocked fans of the Tragically Hip, the Canadian alternative-rock band of which he had been the lead singer since its founding. A farewell tour was quickly arranged, complete with a final hometown concert broadcast live by the CBC—and reportedly watched by 11.7 million people, almost a third of the country's population. When Downie died in October 2017, Canadians mourned the loss of a national hero.

Why were the Hip so beloved in the Great White North? Music journalist Michael Barclay suggests in his intriguing new book that "the story of the Tragically Hip is the story of Canadian music: the people who make it, the people who make it happen, and the fans who celebrate it every day." Moreover, it's a story of "Canadian culture itself, from Northrop Frye to Drake, from Jacques Cartier to Justin Trudeau, and everything in between." Downie and the Hip were quintessentially Canadian, and many of their songs dealt with Canadian history, politics, and sports. The Hip opened a window into the country they loved—inviting listeners to better understand what it was and what it is, and to imagine what it could be.

The band was formed in 1984 in Kingston, Ontario, with a nucleus of high school friends: Downie, Rob Baker (guitarist), Paul Langlois (rhythm guitarist), Gord Sinclair (bassist), and Johnny Fay (drummer). They played venues large and small in every corner of the country, released 14 studio albums and 2 live albums, and won many local awards and accolades.

Gord Downie and the rest of the youthful Tragically Hip in 1993, years before they were dubbed 'Canada's house band'

Their Canadianness came at the expense of potential non-Canadian audiences. Most Americans are unfamiliar with the Tragically Hip's music, which is a real shame. Try as it might, the band just couldn't catch on south of the border. The Hip performed on *Saturday Night Live* in 1995 (thanks to an assist from Canadian-born former *SNL* cast member Dan Aykroyd). They played in many U.S. venues, like New York's Beacon Theater. They had songs that could have attracted American radio attention, including "New Orleans Is Sinking" (1989), which has a real country-rock feel. (The band started, Barclay says, as "small-town Canucks drawing from the American South.") A gold-paved road to U.S. success seemed to be laid out in front of them.

Yet these "reluctant rock stars" who were notoriously "suspicious of celebrity" expressed very little interest in fame and fortune outside Canada. Downie said that he and his bandmates were often asked by interviewers "about our success or lack of success in the States, which I find absurd. … While that is a story of the band, there are so many other stories."

The Hip often "met a wall of resistance when it came to American media—and, by extension, mainstream success," notes Barclay. They were "still a joke to the American press" as late as 2011, seen as an "annoying musical backdrop that only surfaced in small-town Canada, a band whose only possible audience in America was expat Canadians." The Hip was, he writes, "a Cornelius Krieghoff painting surrounded by Picassos and Pollocks."

One reason the Hip achieved the status of Canada's great house band—and one reason they never clicked with audiences outside their homeland—is that their discography is sprinkled with tales of Canadian lore.

The 1991 song "Three Pistols" mentions painter Tom Thomson, an associate of the Algonquin School (or Group of Seven) who drowned in a canoeing accident in 1917. Downie's haunting lyrics—"Tom Thomson came paddling past / I'm pretty sure it was him / And he spoke so softly in accordance / With the growing of the dim"—are sung with growls against a backdrop of pounding guitars. The critic Northrop Frye described one of Thomson's paintings as "an emblem of Canada itself, so long apologetic for being so big an obstacle on the way to somewhere more interesting, yet slowly becoming a visible object in its own right." Barclay, who quotes that

GIE KNAEPS / GETTY

Michael Taube writes a syndicated column for Troy Media.

passage from Frye, compares "Thomson's eye as a painter" with "Downie's indirectness as a lyricist."

The Hip's "Fifty-Mission Cap" discusses Canada's first love: hockey. This propulsive song, driven by the drums, describes the tragic story of Toronto Maple Leafs defenseman Bill Barilko, who scored the Stanley Cup-winning goal in 1951. He disappeared four months later: He and a friend were flying home from a fishing trip but their small plane never made it. (Canada, Downie once said, "seems to be very famous for its disappearances.") Eleven years went by before the Leafs won another cup—and six weeks after that victory, Barilko's long-lost crash site was found and his body recovered.

This story is recounted in Downie's lyrics—which also note "I stole this from a hockey card." Barclay reprints the text of the actual hockey card, which Downie had been "carrying around in his pocket, because he found the story compelling." Apparently, Downie was so fascinated by the Barilko story that he dug around in libraries to learn more, but he "didn't use any of his research beyond what he'd found on the hockey card," Barclay writes. The "Fifty-Mission Cap" of the song title refers to the fact that special hats were given to pilots in World War II after 50 successful missions—something Downie learned during a visit to the National Air and Space Museum in Washington, D.C. In the lyrics, the narrator—whom Downie described in an interview as "a veteran pilot whose ultimate goal is to stay alive, to fly 50 missions"—is contrasted with Barilko and his "flashing moment—that 'is it better to burn out than to fade away' sort of thing."

The 1992 album with "Fifty-Mission Cap" also had on it "Looking for a Place to Happen," a song that mentions the 16th-century explorer Jacques Cartier, who discovered the Gulf of St. Lawrence. The song seems to allude, too, to the exploitation of Native Canadians ("So I'll paint a scene from memory / So I'd know who murdered me").

There are also songs about the beauty of Canadian towns, cities, and communities the Hip visited over three decades of touring. Saskatoon is discussed in "Wheat Kings," which Barclay describes as a "campfire acoustic song about a wrongful conviction, with mention of the CBC and prime ministers of the past." The Athabasca oil sands of Alberta are referenced in "The Depression Suite." Speed River in Guelph, Ontario, has an entire ditty all to itself. A couple of tiny communities that most Canadians would have been unfamiliar with—Mistaken Point, Newfoundland, and Moonbeam, Ontario—make cameos in "Fly."

The Tragically Hip announced what would be their last tour on May 25, 2016, one day after revealing Downie's cancer diagnosis.

MARCUS OLENIUK / TORONTO STAR / GETTY

Given all the stories and references, it is fair to say, as Barclay does, that Downie "elevated Canadian mythology and geography to the level of the mystical." But, especially in his later years, Downie bridled at the suggestion that he might have been uncritically mythologizing his country. "That we're this clean, pristine place, that we know [what's] best for the world, that there's nothing anyone can teach us—these types of things I want no part of, and I don't know anybody who would," he said in 2009.

Although it is certainly true that the Tragically Hip made songs about Canada's rich history—and in so doing encouraged small doses of national pride and taught their fans to be proud of being Canadian—it would be unfair to suggest that the Hip offered unqualified glorification. Take the 1999 song "Bobcaygeon." The lyrics are widely believed to allude to the horrific 1933 Christie Pits riot in Toronto, in which the appearance of a large swastika during a baseball game between the Harbord Playground team (which was primarily Jewish and Italian) and St. Peter's squad set off the largest display of violence the city had ever seen. From the song: "That night in Toronto / With its checkerboard floors / Riding on horseback / And keeping order restored / Till the men they couldn't hang / Stepped to the mic and sang / And their voices rang / With that Aryan twang."

Barclay interprets the song differently, arguing that "one that doesn't have to reach back to the 1930s to find police riots" and pointing out there were several in the 1990s—at a time when neo-Nazis were still walking the streets of Toronto. In his view, "Canadians like to think their racist and / or most brutal incidents are far in the past, but Downie's song is easily set in the 1990s—not the 1930s."

Downie, who greatly admired and praised Canadian prime minister Justin Trudeau's progressive political vision, once said, "I haven't written too many political lyrics." For the most part, that was true for the "everyman band" and its blue-collar(ish) lead singer. But when he felt the urge to do so, as in "Bobcaygeon," the message was powerful and thought-provoking. (And it doesn't hurt that the song's melodic line puts Downie's sometimes tremulous voice to its best musical use.)

In a recent interview, some of the members said that the band is now finished—that they may work on projects together but after Downie's death will no longer be the Tragically Hip. The band's loyal fan base, still in mourning, will appreciate the interviews and stories in Barclay's book as they take stock of the Hip's legacy. And for non-Canadian listeners who are just discovering the band, Barclay's book provides a treasure trove of information that will help in appreciating the beautiful music and lyrical genius of one of Canada's best-kept secrets. ♦

"Donald Trump appears to have been caught on tape during the presidential campaign discussing the logistics of making payments aimed at keeping quiet allegations from a former Playboy model that she had an affair with Trump, according to an audio tape released by an attorney representing Michael Cohen, Trump's former lawyer. . . . The audio is choppy and difficult to hear at times, and several key sections are open to interpretation."

—Politico, *July 24, 2018*

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So we right. So doesn

AUGUST 6, 2018 — ONE DOLLAR CHEAP

TRUMP FLESHES OUT DENIALS OF PAYOFF ALLEGATIONS

Meant to Say 'Paying Lip Service,' Not 'Paying For Lip Service'

By AMBER WAVES

WASHINGTON — President Donald Trump attempted yesterday to clarify his knowledge of a payoff made to former Playboy model Karen McDougal in order to silence her before the 2016 election. "In reviewing the transcript, what I meant to say was 'Miss McDougal was a lousy lay off,'" explained the president during an interview with Sean Hannity. "I meant 'lay off,' because it's a terrible thing for anyone to lose her job, even if it's modeling for Playboy. And as you know, Sean, it's been a failing magazine ever since Hef died. Very sad."

Likewise, Mr. Trump said he intended to use the expression "pay lip service" and not "pay for lip service," as he said to his former lawyer Michael D. Cohen in secretly recorded conversations. "Quite simply, I misspoke again. It happens to the best of us, even to your favorite president."

In other instances, the president blamed members of the media for taking excerpts of the released transcript out of context and overinterpreting phrases such as "extramarital affair." Asked specifically whether or not he had the affair alleged to have taken place in 2006, the president was adamant. "Well, I did not sleep with her."

On NBC's "Meet the Press," however, the president's personal attorney, former New York mayor Rudolph Giuliani, said Mr. Trump was quite aware of payments made in return for Ms. McDougal's silence. "Of course he knew! He knows everything! He practically invented 'catch and release,'" Giuliani told host Chuck Todd via telephone before getting interrupted by another call from the White

Continued on Page A3

CHRIS MCGRATH / GETTY

A comment about "enormous tips" was mistranscribed, says Mr. Trump.

Stormy Daniels's husband seeks divorce, cites adultery

Misinterpreted 'long, hard hours at the office'